No. 98-470

In The

Supreme Court of the United States

October Term, 1998

RUHRGAS AG,

Petitioner,

v.

MARATHON OIL COMPANY,
MARATHON INTERNATIONAL OIL COMPANY,
and MARATHON PETROLEUM NORGE A/S,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX
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Plaintiffs,	§	
VS.	§	
RUHRGAS, A.G.	§	
Defendant.	§	

RUHRGAS AG'S RESPONSE TO MOTION TO REMAND

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Plaintiffs,	§	
VS.	§	
RUHRGAS, A.G.	§	
Defendant.	§	

RUHRGAS AG'S RESPONSE TO PLAINTIFFS' MOTION TO REMAND

TO THE HONORABLE JUDGE OF THE UNITED STATES DISTRICT COURT:

Defendant Ruhrgas AG, subject to and without waiver of its previously filed motions, including but not limited to its Motion to Dismiss for lack of personal jurisdiction, files its Response to Plaintiffs' Motion to Remand.

I.

INTRODUCTION

A. Overview

The Plaintiffs' procedural objective has been to sue Ruhrgas AG in the state courts of Texas over disputes arising from a gas sales agreement between Marathon Petroleum Company (Norway) ("MPCN"), an affiliate of

the Plaintiffs, as seller, and a group of European gas purchasers, including Ruhrgas AG and several state-owned companies, regarding gas deliveries from the Norwegian Heimdal Field to Continental Europe.

This approach faced severe obstacles. The gas sales agreement contains an arbitration clause. Under legislation implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, this court would have removal jurisdiction if MPCN filed a state court action against Ruhrgas AG, and upon removal, would be required to stay the action pending arbitration. Moreover, there is diversity of citizenship between MPCN and Ruhrgas AG. Finally, the state-owned buyers under the gas sales agreement would have the ability to remove the case to federal court under the Foreign Sovereign Immunities Act, as would Statoil, Norway's state-owned oil company, that is also claimed to be responsible for Plaintiffs' alleged damages.

Counsel for Plaintiffs have ingeniously sought to overcome these difficulties, but have done so in manifestly improper ways. First, they have omitted the only real party in interest, MPCN, the seller under the gas sales agreement. Second, they have joined as a plaintiff a Norwegian affiliate, Marathon Petroleum Norge A/S ("Norge"), that assigned away all of its rights in the gas field to MPCN in the 1970's and has not exercised those rights since. Norge is a Norwegian corporation. As an "alien," its presence as a plaintiff would defeat diversity jurisdiction if properly joined. Third, they have joined as plaintiffs affiliates of MPCN who assert demonstrably insupportable claims based upon their alleged status as "lenders" to MPCN. Finally, Plaintiffs have sued none of

the state-owned buyers or Statoil. They have sued only Ruhrgas AG, even though it only comprises approximately 25% of the buyers' shares under the gas sales agreement.

In summary, the configuration of parties and claims is a virtual masquerade, in which no claims are asserted on behalf of the only real party in interest and in which claims are contrived on behalf of parties with no interest.

This Court has subject matter jurisdiction of this action on several grounds. First, Plaintiffs are bound by the arbitration clause in the gas sales agreement. Subject matter and removal jurisdiction exist under 9 U.S.C. §§ 203 and 205 because the claims which are the subject of this case are subject to mandatory arbitration pursuant to the Convention. Second, Norge is not a real party in interest, and it has no possibility of recovery, rendering its joinder fraudulent. Diversity therefore exists. Finally, Plaintiffs' claims raise substantial questions of foreign and international relations, which are incorporated into and form a part of the federal common law, creating federal question jurisdiction.

B. Factual Summary

The claims asserted in this lawsuit arise out of and relate to natural gas produced from the Heimdal Field in the Norwegian North Sea. MPCN sold and continues to sell the gas to Ruhrgas AG and other European buyers. Sales of the gas are governed by the Heimdal Gas Sales Agreement dated March 2, 1984 between MPCN, as seller, and Ruhrgas AG and the other European buyers, and an

amendment thereto dated May 11, 1990 (collectively, the "Agreement") attached to the Notice of Removal as Exhibit "B", Tab 1. The Agreement contains a Norwegian choice of law clause and a clause providing for arbitration of all disputes in Stockholm, Sweden.

During the course of the contractual relationship between MPCN and the buyers under the Agreement, a number of issues relating to the Agreement and in particular to the price of gas arose and were the subject of disputes and negotiations which were conducted primarily in Europe. One such dispute led to an arbitration filed by MPCN with the International Court of Arbitration of the International Chamber of Commerce in 1987. That arbitration resulted in an award in September of 1989. The arbitration award was challenged in court in Stockholm, Sweden by the buyers. While those proceedings were pending, negotiations ensued to resolve the disputes. The result of those negotiations was the amendment to the Heimdal Gas Sales Agreement which was executed in Germany on May 11, 1990, and the withdrawal of the proceedings challenging the arbitration award. Subsequently, further disputes relating to the Agreement developed between MPCN and the buyers. These disputes were the subject of further negotiation between MPCN and the buyers until the filing of this litigation.

C. The Parties Involved In (Or Notably Absent From) This Litigation

MPCN is the seller under the Agreement. The claims asserted herein are claims grounded on the alleged inadequacy of the price paid by Ruhrgas AG and the other buyers *to MPCN* and the resulting adverse economic consequences allegedly suffered *by MPCN*, allegedly rendering MPCN unable to satisfy its purported obligations vis-á-vis the Plaintiffs. While Norge has purported to assert claims as joint venturer and holder of the license in the Heimdal Field, Norge assigned those rights away *to MPCN* in the 1970s and has not exercised those rights since. While Plaintiffs Marathon Oil Company ("MOC") (MPCN's great-grandparent corporation) and Marathon International Oil Company ("MIOC") (MPCN's grandparent corporation) purport to assert claims in their capacity as alleged "lender" to MPCN, Plaintiffs' own representatives have acknowledged in deposition testimony that when Marathon personnel dealt with Ruhrgas AG, they did so only *on behalf of MPCN*, not the "lender," without any discussion with Ruhrgas AG of inter-company financial arrangements.[1] Evans Depo. (Ex. 1) at 23-25, 30; Bossley Depo. (Ex. 2) at 40-46, 53-54, 59-60, 62-64, 77-78. If any misrepresentations had been made to Marathon personnel (which Ruhrgas AG denies), MPCN would be the Marathon entity entitled to assert a claim. Yet MPCN is not a party to this case. At the scheduling conference on

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[1] In any event, it is undisputed that since 1989, the rights of the "lender" have been held by Marathon Petroleum Investment, Ltd, not MOC or MIOC. Evans Depo. (Ex. 1) at 30-36.

November 6, 1995, Magistrate Judge Stacy asked counsel for Plaintiffs why MPCN is not a party. Tr. of Sched. Conf. (Ex. 4) at 8. Plaintiffs' counsel replied:

> ***It's not pursuing the claims. That entity is almost out of existence now because of a lot of bad things that have been going on in Europe.*** If that entity wanted to bring claims on its own, I guess it could go do so in arbitration, but the point is, this case doesn't involve that. This case doesn't involve any breach of contract that Ruhrgas may have had with that entity. It doesn't – it's not asking for any sort of contract damages.

Id. (emphasis added). Contrary to counsel's statement, MPCN is not out of existence and is perfectly capable of asserting any claims it may have.

D. MPCN's Proceedings In European Forums

MPCN is *currently* prosecuting claims arising out of its alleged Heimdal Field losses against Statoil (the Norwegian state-owned oil company) and Statpipe in two separate European forums: (1) before the court in Stavanger, Norway, and (2) before the European Commission. Copies of the papers filed by MPCN in these proceedings are attached hereto as Exhibits 5 and 6. In those proceedings, MPCN alleges that:

- MPCN owns the interest in the Heimdal Field. Ex. 5 ¶ 1.3; Ex. 6 ¶ 9.
- MPCN is the joint venturer with Statoil. Ex. 5 ¶ 1.3.

- MPCN invested $400,000,000 in the Heimdal Field. Ex. 6 ¶9.
- MPCN has suffered the negative effects of low prices and high tariffs. Ex. 5 ¶¶ 4.7, 4.8, 6.2, 8(2); Ex. 6 ¶ 24, 25, 26, 27, 36, 45, 63, 69, 70.
- The practices in dispute substantially affect trade between countries of the European Union and competition in the Common Market. Ex. 6. ¶¶ 63, 64.

Tellingly, those papers reveal that only MPCN (not MOC, MIOC, or Norge) is seeking relief in those proceedings with respect to matters which are also the subject of this case.

E. The Evidence Submitted In Support Of This Response

Ruhrgas AG submits in support of this Response the depositions of Plaintiffs' corporate representatives, John A. Evans, Burton B. Bossley, Jr., and Finn E. Engzelius (Exs. 1, 2 and 3), documentary evidence (Exs. 4-20, 22-63, 66) and legal authorities (Exs. 21, 64). The exhibits are separately bound in two volumes and have been filed concurrently with this Response. An index of the exhibits is set out in Appendix A. Ruhrgas AG also incorporates by reference the affidavits and documentary evidence attached to Ruhrgas AG's Notice of Removal (Instr. No. 1).

II.

SUMMARY OF ARGUMENT

Plaintiffs concede that Ruhrgas AG's removal was procedurally correct. Motion to Remand (Instr. No. 12) at 1. Plaintiffs challenge only the existence of removal jurisdiction.

Three separate and independent grounds of removal jurisdiction exist. Removal is proper (1) under 9 U.S.C §§ 203 and 205 because Plaintiffs are bound to arbitrate their claims pursuant to the Convention On the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2115, 330 U.N.T.S. 38 ("the Convention"); (2) on diversity jurisdiction grounds because Norge is not a real party in interest and/or because Norge was fraudulently joined to defeat diversity; and (3) because Plaintiffs' claims raise substantial questions of foreign and international relations, which are incorporated into and form part of the federal common law, creating federal question jurisdiction.

Initially, subject matter and removal jurisdiction exist under 9 U.S.C. §§ 203 and 205 because the claims which are the subject of this case are subject to mandatory arbitration pursuant to the Convention. Although the Court in its Memorandum and Order signed November 15, 1995 (Instr. No. 38) concluded that Plaintiffs are not bound by the arbitration clause contained in the Agreement, Ruhrgas AG respectfully submits that the Court should reconsider that conclusion based on the arguments and evidence presented in connection with Ruhrgas AG's Motion for Reconsideration (Instr. No. 39)

of that Order[2], which arguments and evidence are discussed in detail herein. First, Plaintiffs are bound to arbitrate under the Agreement under the "group of companies" doctrine which has developed in international arbitration by virtue of the fact that MOC and MIOC personnel, acting on behalf of MPCN, controlled the negotiation and execution of the Agreement as well as performance and arbitration under the Agreement. Second, Plaintiffs are bound under U.S. legal principles. The Court based its conclusion that Plaintiffs' are not bound to arbitrate on its determinations that Plaintiffs' claims are based on alleged conduct of Ruhrgas "in relation to [Plaintiffs], not in relation to MPCN" and are "independent" of any claims which MPCN might assert. Memorandum and Order (Instr. No. 38) at 7, 8-9. The deposition admissions of the corporate representatives of MOC and MIOC now show that whenever Marathon personnel dealt with Ruhrgas AG, they were doing so *on behalf of MPCN*, not MOC, MIOC, or Norge. Evans Depo. (Ex. 1) at 23-25, 30; Bossley Depo. (Ex. 2) at 40-46, 53-54, 59-60, 77-78. As a result, even if it is assumed that

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[2] A series of filings have been made by the parties in connection with the Motion for Reconsideration. Those filings are as follows: (1) Motion for Reconsideration of Order Denying Motion for Stay Pending Arbitration (Instr. No. 39); (2) Plaintiffs' Response to Ruhrgas AG's Motion to Reconsider (Instr. No. 42); (3) Ruhrgas AG's Reply to Plaintiffs' Response to Ruhrgas AG's Motion to Reconsider (Instr. No. 47); (4) Plaintiffs' Surreply Brief Regarding Ruhrgas AG's Motion to Reconsider (Instr. No. 53); (5) Rurhgas AG's Response to Plaintiffs' Surreply Brief Regarding Ruhrgas AG's Motion to Reconsider (Instr. No. 59).

Ruhrgas AG made misrepresentations to Marathon personnel (which Ruhrgas AG denies), such representations were made to *MPCN*. Additionally, a new affidavit from the secretary of MOC and MIOC, Mr. John Evans (Ex. 7), shows that Plaintiffs' claims are based on the contention that Ruhrgas AG's conduct harmed *MPCN* by rendering it unable to satisfy its obligations. Ex. 7 ¶¶ 8, 9. It is now undisputed that Plaintiffs' claims *are* based on conduct "in relation to MPCN" and are *not* "independent" of claims by MPCN. Plaintiffs are bound to arbitrate their claims, and this Court has subject matter jurisdiction under 9 U.S.C. §§ 203 and 205.

Diversity jurisdiction exists because Norge does not hold the substantive rights sought to be enforced in this case and therefore is not a real party in interest. Norge assigned away all of its rights in the Heimdal Field to MPCN in the 1970s, and has not exercised those rights since. Norge is an inactive company, conducting no business other than the filing of accounts of its assets and liabilities with the Norwegian government as required by Norwegian law. Engzelius Depo. (Ex. 3) at 11-20, 22-24. Those accounts (Exs. 8-19)[3] reflect that the rights sought to be enforced in this case are not shown as assets of Norge. ***Id.*** at 72-77. The absence of any interest in Norge is also reflected in the proceedings MPCN has commenced in Europe, in which MPCN alleges that *it* owns the rights in the Heimdal Field and is the joint venturer with Statoil. Ex. 5 ¶ 1.3; Ex. 6 ¶ 9. While the assignment documents created *a possibility* of a *future* reversion of

[3] Exhibits 8-19 were marked at the deposition of Mr. Engzelius as Deposition Exhibits 31-42.

those rights to Norge, such a reversion has not taken place, and may never take place. Engzelius Depo. (Ex. 3) at 59-60, 85-91. Norge at most holds a possibility of reverter which depends upon the occurrence of events beyond the control of Norge, an interest which does not give Norge standing to assert any claims herein. These facts show that Norge is not a real party in interest and should be disregarded in determining diversity.

Furthermore, Norge, for a number of independent reasons, has no possibility of recovery, making its joinder fraudulent: (1) Norge, as the holder of at most a possibility of reverter with respect to rights in the Heimdal Field, is not entitled to seek recovery of alleged damage to those rights; (2) Norge, which has not held the right to produce or sell Heimdal gas since the 1970s and has never had any dealings with Ruhrgas AG, itself has – engaged in no negotiations for prospective business relations having anything to do with the Heimdal Field; (3) Norge cannot assert a cause of action for any alleged tortious interference with the prospective business relations *of MPCN;* and (4) Norge has suffered no legally cognizable damages. On this last issue, it is undisputed that Norge had no anticipation that it would ever realize any value from rights in the Heimdal Field after it assigned the rights to MPCN. Engzelius Depo. (Ex. 3) at 52, 58. Norge's income, expenses, assets and liabilities have not been affected by any matters relating to the Heimdal Field. ***Id.*** at 72-83, 106-107, 109-110. The value of the rights in the Heimdal Field upon reversion to Norge (if such a reversion ever occurs) will turn on the pricing and transportation available at the time of reversion, not on that which was available while MPCN held the rights.

Id. at 96-97. The alleged conduct of Ruhrgas AG has had no economic impact on Norge and never will. Because Norge has no possibility of recovery, its joinder was fraudulent, and diversity therefore exists.

This Court also has removal jurisdiction because Plaintiffs' claims raise substantial questions of foreign and international relations, which are incorporated into and form part of the federal common law, creating federal question jurisdiction. The Federal Republic of Germany has submitted a Note Verbale to the United States State Department (Ex. 20) and has filed an Amicus Curiae Brief in this case (Instr. No. 58), both of which demonstrate that substantial international issues are raised by this litigation. In MPCN's European Commission proceeding, in which it complains of practices concerning prices and tariffs for Heimdal gas, MPCN asserts that "the alleged practices affect trade between Member States [of the European Union] and . . . competition in the Common Market must consequently be regarded as substantially affected." Ex. 6 ¶ 64. The substantial questions of foreign and international relations raised by this case confer federal question jurisdiction, supporting Ruhrgas AG's removal.

III.

THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS CREATES SUBJECT MATTER JURISDICTION

Among the provisions enacted by Congress in implementing the Convention were two provisions designed to insure that parties involved in disputes covered by the Convention would have access to the federal courts for rulings on Convention issues. Specifically, Congress conferred federal question jurisdiction on the federal courts over cases implicating the Convention, 9 U.S.C. § 203, and the right to remove to federal court any case within the scope of the Convention filed in state court, 9 U.S.C. § 205. These jurisdictional provisions were important to the ratification process because of the need for uniformity in the development of standards governing Convention cases. ***McDermott International, Inc. v. Lloyds Underwriters of London,*** 944 F.2d 1199, 1210-12 (5th Cir. 1991).

Under 9 U.S.C. §§ 203 and 205, this court has subject matter jurisdiction of this case, and this case was properly removed to this court, because the claims asserted herein are subject to arbitration under the Convention. Although the Court issued an Order on November 15, 1995 (Instr. No. 38) denying Ruhrgas AG's Motion for Stay Pending Arbitration, Ruhrgas AG respectfully submits that the matters raised by Ruhrgas AG in connection with its pending Motion for Reconsideration (Instr. No. 39) of that Order, which are discussed in detail below, demonstrate that Plaintiffs are bound to arbitrate their claims under the Convention.

The Fifth Circuit has applied a four-prong test in determining whether a dispute is subject to arbitration under the Convention:

1. Is there an agreement in writing to arbitrate the subject of the dispute?
2. Does the agreement provide for arbitration in the territory of a signatory of the Convention?
3. Does the agreement arise out of a commercial legal relationship?
4. Is a party to the agreement not an American citizen?

Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co., 767 F.2d 1140, 1144-45 (5th Cir. 1985). If the district court resolves all four questions in the affirmative, the disputes must be resolved in arbitration. 767 F.2d at 1145.

There can be no dispute that the arbitration clause contained in Article 15 of the Agreement meets the second, third, and fourth requirements set out in ***Sedco***. Article 15 of the Agreement expressly provides for arbitration in Stockholm, Sweden. Because Sweden is a signatory of the Convention, the second requirement of the ***Sedco*** test is satisfied. The Agreement clearly arises out of a commercial legal relationship, satisfying the third element of the ***Sedco*** test. The fourth element is satisfied because Ruhrgas AG is a German corporation with its principal place of business in Germany. This leaves the question whether there is an agreement in writing to arbitrate the subject of this dispute. As shown more fully below, this requirement is also satisfied.

A. The Writing Requirement is Satisfied

Plaintiffs argue that the Convention does not apply because (i) Plaintiffs did not sign the Heimdal Gas Sales Agreement, and (ii) Plaintiffs are not parties to any arbitration agreement with Ruhrgas AG. These arguments are inconsistent with Fifth Circuit authority.

The Fifth Circuit has rejected the argument that the Convention requires that the arbitration clause be contained in an agreement that has been signed by the party asserting the claim. In ***Sphere Drake Insurance Plc v. Marine Towing, Inc.,*** 16 F.3d 666 (5th Cir. 1994), the Court held that the plaintiff was bound to arbitrate its claims under an insurance policy even though the plaintiff had not signed the policy. 16 F.3d at 669. The court held that the "agreement in writing" requirement of the Convention is satisfied where there is an arbitral clause in a contract; a signature is not required. ***Id.***

Similarly, there is no requirement under the Convention that the plaintiff and the defendant must be parties to the agreement containing the arbitration clause. In ***Sedco v. Petroleos Mexicanos Mexican Nat'l Oil Co.,*** 767 F.2d at 1144-45, the Fifth Circuit identified the relevant inquiry to be whether there is "an agreement in writing to arbitrate the dispute." The answer to this question turns on whether the plaintiff is *bound* by a written arbitration clause to arbitrate its claim. As shown below, Plaintiffs are bound to arbitrate the claims asserted in this case.

B. Plaintiffs are Bound to Arbitrate the Dispute

1. Plaintiffs are bound to arbitrate under the "group of companies" doctrine

In international arbitration, a doctrine known as the "group of companies" doctrine has developed. Under that doctrine, where a parent company exercises control over a subsidiary in the negotiation, execution, performance, and/or termination of an agreement containing an arbitration clause, the whole group of companies is bound by the arbitration clause in the agreement entered into by the subsidiary. Application of this doctrine is exemplified by ***Dow Chemical v. Isover Saint Gobain,*** Cour d' Appel, Paris, 21 October 1983, 110 J. 899 (1983) *IX Yearbook* 132 (1984) (English translation). The English translation version of this decision as published in the Yearbook of Commercial Arbitration, published by the International Council for Commercial Arbitration, is attached hereto as Exhibit "21".

In ***Dow,*** the threshold question was whether the claims of the Dow parent company, Dow Chemical Company, and its subsidiary Dow Chemical France (neither of which had signed distribution agreements executed by two other Dow companies which contained arbitration clauses) were arbitrable. The panel noted that the parent company, Dow Chemical Company, had "primary involvement" in the agreements and "was the pivot of the contractual relationship finally established between certain entities of its group and the distributors." IX Yearbook at 135. The panel also noted that Dow Chemical France "played in the execution of the contracts an equally preponderant role as it did in the establishment

of the contractual relations." The panel concluded that the claims of Dow Chemical Company and Dow Chemical France were arbitrable, stating:

> [I]t is indisputable – and in fact not disputed – that Dow Chemical Company (USA) has and exercises absolute control over its subsidiaries having either signed the relevant contracts or, like Dow Chemical France, effectively and individually participated in their conclusion, their performance, and their termination. . . . [I]rresepective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality *(une réalité économique unique)* of which the arbitrable tribunal should take account when it rules on its own jurisdiction subject to Article 13 (1955 version) or Article 8 (1975 version) of the ICC Rules. . . . [T]he arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to have been veritable parties to these contracts *or* to have been principally concerned by them and the disputes to which they may give rise. . . . [I]t is appropriate for the tribunal to assume jurisdiction over the claim brought not only by [the Dow affiliates which were parties to the arbitration agreements], but also by Dow Chemical Company (USA) and Dow Chemical France.

Id. at 136-37 (emphasis in original). In reaching this result, the panel noted that it was taking into account "the needs of international commerce." ***Id.*** at 136.

The award in the *Dow* arbitration was appealed to the Paris Court of Appeals, and the court affirmed the decision of the arbitrators. The court specifically referred to the "group of companies" doctrine, noting that "the existence of [the doctrine] according to the customs of the international trade has not been seriously contested by the defendant." *Id.* at 132. In the Amicus Curiae Brief which the Federal Republic of Germany has filed herein (Instr. No. 58) at 17-18, Germany specifically acknowledges the validity of the doctrine and its applicability to this case.

In an effort to distinguish *Dow*, Plaintiffs first argue that *Dow* involves the application of French law. The arbitrators, however, rejected the contention that French law governed the arbitrability issue, concluding that the parties' selection of the International Chamber of Commerce Rules ("ICC Rules") to govern arbitration issues allowed the arbitrators to apply international principles without reference to any particular nation's law. IX Yearbook at 133-34. The arbitration clause in the Agreement also references and incorporates the ICC Rules. Agreement ¶ 15.

Next, Plaintiffs argue that *Dow* is distinguishable on its facts because the question in that case was whether a non-signatory parent and a non-signatory affiliate could voluntarily assert claims in arbitration against a contract signatory. According to Plaintiffs, *Dow* merely stands for the proposition that where a non-signatory parent or affiliate of a signatory to the agreement voluntarily elects to assert claims in arbitration against another signatory to the agreement, arbitration is appropriate. The actual rationale of the decision in *Dow*, however, is set forth in

the decision itself, as quoted at length above. Most to the point is the determination that "the arbitration clause expressly accepted by certain of the companies of the group should bind the other companies. . . . " *Id.* at 137. Plaintiffs' analysis of *Dow* cannot be reconciled with the rationale set forth in the decision.

In any event, Plaintiffs' argument is contrary to the basic rule of mutuality of contractual obligations. Apparently, Plaintiffs contend that Dow Chemical Company and Dow Chemical France could force the defendant to arbitrate, but the defendant could not force Dow Chemical Company and Dow Chemical France to arbitrate. There is no rational basis for such a rule. Either the parties to a dispute are bound to arbitrate their dispute, or they are not.

The principles applied in *Dow* are equally applicable here. MOC and MIOC personnel have consistently and exclusively controlled the operations of MPCN in the Heimdal field and MPCN's contractual relations with Ruhrgas AG and the other European buyers. The Marathon personnel involved in the Heimdal Field project were employees of MOC who were directed to deal with contractual matters under the Agreement on behalf of MPCN. Evans Depo. (Ex. 1) at 23-25, 30. The testimony and correspondence discussed below demonstrate the control of MOC and MIOC personnel in (a) the negotiation and execution of the Agreement, (b) matters relating to arbitration under the Agreement, (c) matters relating to settlement of disputes under the Agreement and (d) matters relating to performance under the Agreement.

a. Negotiation and execution of the Agreement.

In the arbitration between MPCN and Ruhrgas AG and the other European buyers commenced in 1987, Daniel J. Sullenbarger provided an Affidavit. Mr. Sullenbarger testified:

> From August 1980, until September 1984, I was employed by Marathon Oil Company in its international organization as an attorney. During that period of time, I was on the *Marathon Oil Company team* which conducted Marathon Petroleum Company (Norway)'s gas sales negotiations with the Consortium of Gas Buyers.

Ex. 22 (emphasis added).[4] This affidavit testimony makes it clear that the negotiations leading to the Agreement were conducted by a "Marathon Oil Company team" acting on behalf of MPCN. ***Id.*** As early as March of 1981, "Marathon Oil London" gave notice that "all necessary corporate approvals" related to the sale of the Heimdal gas to Ruhrgas AG and the other European buyers had been obtained. Ex. 23. The Heimdal Gas Sales Agreement was signed on behalf of MPCN by W. L. Kinney, who was President of MIOC and Vice-President, International Operations, of MOC. ***See*** Exs. 24, 25 and 26. In short, the negotiations leading to execution of the Heimdal Gas Sales Agreement were controlled by MOC personnel, and the Agreement was executed on behalf of MPCN by a high level executive in both MOC and MIOC.

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[4] The Affidavit of Mr. Sullenbarger (Ex. 22) was marked at the deposition of Mr. Bossley as Deposition Exhibit 15.

b. Arbitration Issues

MOC and MIOC personnel exercised complete control over all matters relating to arbitration under the Agreement. In connection with the dispute which ultimately led to the arbitration commenced in 1987, MOC board minutes reflect that "arbitration with the gas purchasers could go forward at the same time relief in pipeline tariffs is sought from the Norwegian Ministry of Energy." Ex. 27. Later, after the arbitration proceedings had been initiated, B. B. Bossley, Jr. sent a telex to Ruhrgas AG and the other European buyers directing that "in the future all communications to Marathon relative to the arbitration should be directed to my attention as follows: B. B. Bossley, Jr., Manager, Heimdal Project Team." Ex. 28. The telex is signed "B. B. Bossley, Jr., Manager, *Heimdal Project Team, Marathon Int'l Oil Company*-Houston." ***Id.*** (emphasis added). Mr. Bossley was also an officer of Marathon Oil Company; his business card described him as "Manager Heimdal Project Marathon Oil Company." Ex. 29.[5] Mr. Bossley confirmed in his deposition that he "headed up" the Heimdal Project Team and that he "handled the arbitration for Marathon Petroleum Company (Norway)." Bossley Depo. (Ex. 2) at 16-17. Upon rendition of the arbitration award, MOC personnel handled the collection of the award from Ruhrgas AG and the other European buyers. Ex. 30. When disputes continued after the award by virtue of the European buyers' hardship claim, MOC personnel made arguments concerning the *res judicata* effect of the arbitration award

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[5] Mr. Bossley's telex (Ex. 28) and his business card (Ex. 29) were marked at his deposition as Deposition Exhibits 12 and 11.

and made a proposal which involved abstaining from the prosecution of a second arbitration case. Ex. 31.[6] Subsequently, in January of 1994, in connection with a dispute which had arisen in connection with the gas tax side letter which was executed in connection with the May 1990 amendment to the Agreement, M. S. Strathman, in a letter written on Marathon Oil Company letterhead, stated:

> If you do not pay our invoices or otherwise come to an agreement on the gas tax side-letter dispute, at present *we see no alternative but to take the issue to arbitration.* This is not our preferred option, but we are prepared to pursue it if necessary.

Ex. 32 (emphasis added). These Marathon documents demonstrate that MOC and MIOC personnel controlled the prosecution of the arbitration under the Agreement on behalf of MPCN and have actively threatened to initiate arbitration under the Agreement.

c. Amendments and Settlement Proposals

MOC and MIOC personnel made proposals and counter proposals on MOC and MIOC letterhead on behalf of MPCN for the settlement of the disputes which arose after the arbitration award, including proposals for an amendment to the Agreement. ***See, e.g.,*** Exs. 33 through 41. The settlement was approved by the Executive Committee of MOC. Ex. 42. The amendment was

[6] Ex. 31 was marked at the deposition of Mr. Bossley as Deposition Exhibit 17.

executed by R. T. Chamblin, who was Vice-President, International Production, of MOC, as well as President of MPCN. Ex. 34; Bossley Depo. (Ex. 2) at 33. Later, in September of 1994, a Marathon representative made a proposal on MOC letterhead on behalf of MPCN for mutual termination of the Agreement and a new pricing mechanism. Ex. 43.

d. Performance Under the Agreement

When MPCN closed its Norway office, a telex was sent to the buyers dated December 8, 1986 directing that all further communications to MPCN be directed to Ralph D. Mathis. Ex. 44. Mr. Mathis signed the telex as "Joint Ventures Manager, Marathon Oil Company, Houston." ***Id.*** Mr. Richard Lewis submitted an affidavit in connection with the arbitration in which he testified: "I am presently senior joint interest representative *for Marathon Oil Company and I am responsible for Marathon operations in the Heimdal Field. . . .* " Ex. 45 (emphasis added). Mr. Lewis made a presentation to the Norwegian Minister of Energy in 1987 for the purpose of demonstrating "economic hardship resulting from the new price formula being imposed upon Marathon by the Consortium." ***Id.*** Various correspondence concerning operational and contractual matters has been sent over the years by both MOC and MIOC personnel on behalf of MPCN. ***See, e.g.,*** Exhibits 46 through 55. This correspondence included correspondence concerning pricing issues. ***See*** Exhibits 48, 49, 50, 51 and 55.

The documents and testimony of Marathon representatives described above demonstrate that MOC and

MIOC personnel have controlled the negotiation of the Agreement on behalf of MPCN, MPCN's operations in the Heimdal Field, MPCN's performance under the Agreement and dispute resolution under the Agreement. Under the "group of companies" doctrine, all of the Plaintiffs are bound to arbitrate disputes arising out of or relating to the Agreement, including those asserted in this lawsuit.

Because the "group of companies" doctrine recognized under international law renders all of the claims asserted herein arbitrable, it is unnecessary to analyze whether the claims would be arbitrable in a purely domestic context. The United States Supreme Court has recognized that international comity, respect for the capacities of a foreign and transnational tribunal, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that arbitration agreements entered into in international commercial transactions be enforced, irrespective of whether those agreements would be enforceable under domestic arbitration principles. ***Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.***, 473 U.S. 630, 105 S.Ct. 3346, 3353 (1985); ***Scherk v. Alberto-Culver Co.***, 417 U.S. 506, 94 S.Ct. 2449, 2455-57 (1974).

In ***Scherk***, the U.S. Supreme Court held, due to the importance of arbitration in the international business arena, that claims under the Securities Exchange Act of 1934 arising out of an international transaction were arbitrable, even assuming that such claims would not be arbitrable in a domestic context. 94 S. Ct. at 2455-57. The Court relied heavily on the importance of arbitration

agreements in international transactions, noting the crucial role that arbitration agreements play in eliminating uncertainties as to the situs of and procedures governing dispute resolution and in insuring that disputes will be resolved in a neutral forum pursuant to mutually agreeable procedures. ***Id.*** at 2456-57. The Court held that denial of arbitration in an international transaction based on United States legal principles would defeat these important purposes and "would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages." ***Id.*** The Court noted that a ruling that American standards must govern the controversy would "demean the standards of justice elsewhere in the world, and unnecessarily exalt the primacy of United States law over the laws of other countries." ***Id.*** at 2456 n. 11.

In ***Mitsubishi Motors,*** the U.S. Supreme Court applied these same international comity principles in holding antitrust claims arbitrable under an international arbitration agreement, even assuming that antitrust claims are non-arbitrable in a domestic context. 105 S. Ct. at 3355-60. The Court reaffirmed ***Scherk*** and restated its commitment to enforce international arbitration agreements even where U.S. legal principles would preclude arbitration. ***Id.*** at 3346.

Under the principles applied by the U.S. Supreme Court in ***Scherk*** and ***Mitsubishi Motors,*** the claims asserted herein are arbitrable under the "group of companies" doctrine recognized under international law, irrespective of whether the claims would be arbitrable under purely domestic arbitration principles in the United

States. However, as shown below, the same result is mandated by United States law.

2. Plaintiffs are bound to arbitrate under U.S. legal principles

In its Memorandum and Order signed November 15, 1995 (Instr. No. 38) denying Ruhrgas AG's Motion for Stay Pending Arbitration, the Court based its conclusion that Plaintiffs are not bound to arbitrate their claims on its determinations that Plaintiffs' claims are based on alleged conduct of Ruhrgas "in relation to [Plaintiffs], not in relation to MPCN," and are "independent" of any claims which MPCN might assert. Memorandum and Order (Instr. No. 38) at 7, 8-9. However, the admissions of the corporate representatives of MOC and MIOC now show that Plaintiffs' claims *are* based on alleged conduct "in relation to MPCN" and are *not* "independent" of any claims which MPCN might assert.

Plaintiffs' claims are based on alleged misrepresentations made by Ruhrgas AG during the course of its dealings with Marathon personnel. However, the corporate representatives of MOC and MIOC testified in deposition that when Marathon personnel dealt with Ruhrgas AG, they did so only *on behalf of MPCN*. Evans Depo. (Ex. 1) at 23-25, 30; Bossley Depo. (Ex. 2) at 40-46, 53-54, 59-60, 77-78. It is now undisputed that Plaintiffs' claims are based on representations made to Marathon personnel *while they were acting on behalf of MPCN*. While Plaintiffs also assert that Ruhrgas AG has tortiously interfered with efforts to market the Heimdal Field gas to others, the only Marathon affiliated company which allegedly has made

any efforts to market the gas *is MPCN*. First Amended Petition ¶ 46; ***see also*** Engzelius Depo. (Ex. 3) at 91. Additionally, Mr. Evans testified by affidavit that Plaintiffs' claims are based on the contention that Ruhrgas AG's conduct harmed *MPCN* by rendering it unable to satisfy its obligations. Ex. 7. Plaintiffs' purported claims *are* based on alleged conduct of Ruhrgas AG "in relation to MPCN," and are not "independent" of any claims of MPCN. As shown below, these undisputed facts demonstrate that Plaintiffs are bound to arbitrate their claims under United States legal principles.

a. The "virtual representation" doctrine renders Plaintiffs' claims arbitrable

In ***In re Talbott Big Foot, Inc.,*** 887 F.2d 611 (5th Cir. 1989), the Fifth Circuit suggested that a plaintiff who is not a party to the agreement containing the arbitration clause nevertheless may be bound if it is in privity with a party to the agreement such that an award in an arbitration under the agreement would have preclusive effect against the plaintiff under the virtual representation doctrine. 887 F.2d at 614 n.4. A circumstance in which the virtual representation doctrine will apply is where (1) a parent corporation or other affiliate has exercised control over the activities of its affiliate, and (2) the claims asserted by the parent are "identical" for *res judicata* purposes. ***See Astron Industrial Associates, Inc. v. Chrysler Motors Corp.,*** 405 F.2d 958, 961 (5th Cir. 1968). In fact, ***Astron*** is indistinguishable from this case and demonstrates that the virtual representation doctrine applies here.

Astron was the parent company of Transcontinental. Transcontinental was party to a contract with Chrysler under which Chrysler was to supply Transcontinental with automobile parts and supplies. Transcontinental filed a lawsuit against Chrysler on the grounds that Chrysler had breached the contract to supply automobile parts and had made false representations. Transcontinental subsequently filed a voluntary bankruptcy petition and the trustee in bankruptcy settled the case, resulting in a dismissal with prejudice. Subsequently, Astron filed a lawsuit remarkably similar to the claims made by Plaintiffs in this case. Astron "alleged that it purchased all of the stock of Transcontinental and advanced [Transcontinental] funds in reliance upon Chrysler's representations that it would supply Transcontinental with automobile parts and supplies. . . . " 405 F.2d at 960.

The Fifth Circuit held that Astron was in privity with Transcontinental under the virtual representation doctrine and that its claims were barred by the doctrine of *res judicata*. ***Id.*** at 960-62. In addressing the first element, that of control, the court noted that "Astron completely controlled Transcontinental as its sole shareholder, an officer of Astron operated Transcontinental, and the Board of Directors of Astron authorized the initial lawsuit by Transcontinental against Chrysler." ***Id.*** at 961. As shown above, the degree of control exercised by MOC and MIOC personnel over MPCN was at least as great as that exercised in ***Astron***, and the first element of the "virtual representation" doctrine is satisfied.

In addressing the second element, identity of claims, the Fifth Circuit in ***Astron*** noted the following:

> In both suits the *only* wrong which Chrysler allegedly committed was its failure to supply automobile parts and supplies to Transcontinental. . . . Whether the theory of recovery be misrepresentation to Transcontinental, misrepresentation to Astron, breach of contract with Transcontinental, or breach of contract with Astron, the operative wrong remains the same, the evidence necessary to sustain the allegation is the same, and a different judgment in this suit would impair rights under the earlier dismissal.

Id. at 962 (emphasis in original).

The same principles apply here. The "wrong" allegedly committed by Ruhrgas AG is the alleged failure to pay MPCN a premium price. Plaintiffs' own characterization of their claims confirms this:

> Ultimately, Ruhrgas refused to pay the promised premium price, and MPCN (the Marathon affiliate through which Heimdal's development and its attendant gas sales were accomplished) had no means of repaying the advances made to it by Marathon and MIOC. Marathon and MIOC now have suffered tremendous resulting losses.

Plaintiffs' Brief in Support of Their Motion to Remand (Instr. No. 13) at 4. It is undisputed that any alleged representations made to Marathon personnel by Ruhrgas AG were allegedly made while those Marathon personnel were acting *on behalf of MPCN*. Evans Depo. (Ex. 1) at 23-25, 30; Bossley Depo. (Ex. 2) at 40-46, 53-54, 59-60, 77-78. Similarly, the tortious interference claims are based on alleged interference with *MPCN's* efforts to market the gas to others. First Amended Petition ¶ 46. The recent affidavit of Mr. Evans submitted by Plaintiffs (Ex. 7)

demonstrates that the heart of this case is Plaintiffs' claim that Ruhrgas AG disabled *MPCN* from repaying its obligations. Ruhrgas AG respectfully submits that this Court's conclusion in its November 15, 1995 Order (Instr. No. 38) at 9-10, that the claims asserted by Plaintiffs are "independent" of those of MPCN for purposes of applying the virtual representation doctrine, is contrary to the undisputed facts which have now been developed, and is inconsistent with ***Astron***, which is indistinguishable from the facts of this case.[7]

Without challenging the applicability of the ***Astron*** analysis on the "identity of claims" issue, Plaintiffs attempt to distinguish ***Astron*** by arguing that Transcontinental had actually asserted claims against Chrysler, whereas here, MPCN has not pursued any claims against Ruhrgas AG. However, MPCN's failure to assert claims against Ruhrgas AG can only be explained as procedural maneuvering designed to unilaterally defeat Ruhrgas AG's right to arbitration. The testimony of Plaintiffs' own corporate representatives demonstrates that the Marathon personnel to whom the alleged misrepresentations were made were acting on behalf of *MPCN*. The alleged

[7] The arguments for application of the virtual representation doctrine are even stronger here than in *Astron*. As noted above, Plaintiffs' own characterization of the claims demonstrates that those claims are derivative from harm allegedly suffered by MPCN. The Fifth Circuit has held that the virtual representation doctrine applies as a matter of law where the damage claims asserted are derivative. *Terrell v. DeConna*, 877 F.2d 1267, 1271 (5th Cir. 1989). *See also Akin v. Pafec Limited*, 991 F.2d 1550, 1560 (11th Cir. 1993) (shareholder in privity with corporation where shareholder's damages were derivative from harm suffered by corporation).

"wrong" committed by Ruhrgas AG was the alleged failure to pay a premium price to *MPCN*. The tortious interference claims are based on alleged interference with *MPCN's* marketing efforts. Plaintiffs are not asserting that MPCN has no claims arising out of the conduct which is the subject of this case, only that MPCN has chosen not to assert those claims. If this argument is valid, MOC and MIOC, which have the ability to control and have controlled MPCN's actions in matters concerning the Agreement, can unilaterally defeat Ruhrgas AG's right to arbitration by causing MPCN to withhold its claims. Such a result would favor form over substance and would reward procedural maneuvering. Under ***Astron***, Plaintiffs are in privity with MPCN under the virtual representation doctrine. Plaintiffs are bound to arbitrate their claims.

b. Other U.S. authorities demonstrate that Plaintiffs are bound to arbitrate

Ruhrgas AG has previously cited several cases providing independent support for its position that Plaintiffs are bound to arbitrate their claims under U.S. legal principles. See Memorandum in Support of Ruhrgas AG's Motion for Stay Pending Arbitration (Instr. No. 7) at 9-13. Ruhrgas AG will not repeat its discussion of all of those authorities, but will discuss two of those cases in light of the evidence which has been submitted to the Court in connection with Ruhrgas AG's Motion for Reconsideration (Instr. No. 39), which evidence is discussed in detail herein. The following cases demonstrate that given the evidence which has now been fully developed and the

nature of the claims asserted, Plaintiffs are bound to arbitrate their claims.

i. ***Ripmaster v. Toyoda Gosei, Co., Ltd.***, 824 F. Supp. 116 (E.D. Mich. 1993).

In ***Ripmaster,*** the plaintiff was an individual who was employed by a company which had entered into a consultation agreement with the defendant providing for arbitration. The plaintiff claimed that his fraudulent misrepresentation, unjust enrichment, and promissory estoppel claims against the defendant were not subject to arbitration because he was not a party to the consultation agreement. The court rejected this argument and held that the claims were subject to arbitration under the consultation agreement. 824 F. Supp. at 117-18. The court noted that even though the plaintiff was *not* a party to his employer's contract with the defendant, he was properly characterized as a third-party beneficiary to the contract for purposes of determining arbitrability, and was therefore bound by the arbitration clause, because he was claiming that the defendant failed to pay money to his employer, which resulted in the employer not paying money to the plaintiff. 824 F. Supp. at 117-18.

In the November 15, 1995 Order, this Court distinguished ***Ripmaster*** by stating:

> It appears from the opinion, however, that the plaintiffs damages were due to the defendant's alleged breach of the contract with the employer. ***Id.*** at 118. In the instant case, Marathon's claims are based on representations and actions by Ruhrgas *in relation to Marathon, not in relation to MPCN.*

Memorandum and Order (Instr. No. 38) at 8 (emphasis added). Ruhrgas AG respectfully submits that it is now undisputed that Plaintiffs' claims *are* based on alleged representations and actions by Ruhrgas AG "in relation to MPCN." The corporate representatives of MOC and MIOC have now confirmed that all MOC and MIOC personnel dealing with Ruhrgas AG were doing so *on behalf of MPCN.* Evans Depo. (Ex. 1) at 23-35; Bossley Depo. (Ex. 2) at 40-46, 53-54, 59-60, 77-78. Any representations made by Ruhrgas AG during those dealings would have been made *to MPCN.* Furthermore, the alleged wrong is the failure to pay a premium price *to MPCN.* The essence of Plaintiffs' claims is that Ruhrgas AG broke its alleged promises *to MPCN* and that *MPCN* was so adversely affected that it was rendered unable to make payments on its obligations, which Plaintiffs contend would have ended up in the coffers of MOC and MIOC in the form of dividends. Given these undisputed facts, Ruhrgas AG respectfully submits that the claims asserted by Plaintiffs *are* based on alleged representations and actions "in relation to MPCN." ***Ripmaster is*** not distinguishable.

ii. ***J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.***, 863 F.2d 315 (4th Cir. 1988).

J.J. Ryan alleged that Rhone Poulenc committed tortious acts in causing its affiliates to terminate distribution agreements, each of which contained an arbitration clause. J.J. Ryan argued that the claims were not arbitrable because it had no arbitration agreement with Rhone Poulenc. The Fourth Circuit analyzed each of the various

tort claims and concluded that each was subject to arbitration under the arbitration clause contained in the distribution agreements, notwithstanding the fact that Rhone Poulenc was not a party to those agreements. ***Id.*** at 318-22.

In its November 15, 1995 Order (Instr. No. 38), this Court distinguished ***J.J. Ryan,*** stating that the defendant in ***J.J. Ryan*** "was trying to enforce arbitration on a party who had at least agreed to arbitrate its claims with the subsidiaries." Memorandum and Order (Instr. No. 38) at 7. This Court noted that Ruhrgas AG "is trying to force arbitration on the Plaintiffs, who have not consented to arbitration with anyone." ***Id.***

Ruhrgas AG respectfully submits that this distinction is not valid, particularly in light of the facts which have now been developed and submitted to the Court in connection with the Motion for Reconsideration (Instr. No. 39) filed by Ruhrgas AG, which are discussed in detail herein. MOC and MIOC personnel controlled the negotiation and execution of the Agreement, which contained the arbitration clause. Plaintiffs' purported claims are based on alleged misrepresentations made to MOC and MIOC personnel while acting *on behalf of MPCN*, and alleged interference with the marketing efforts of *MPCN*. The claims are based on contentions that *MPCN* has suffered harm, rendering MPCN unable to make payments which ultimately would allegedly flow through to MOC and MIOC in the form of dividends. In negotiating and executing the Agreement on behalf of MPCN, MOC and MIOC personnel clearly understood and agreed that claims based on allegations that Ruhrgas AG had wrongfully harmed MPCN would be resolved in arbitration.

Under these unique circumstances, the Fourth Circuit's observation is equally applicable here: "If the [defendant] was forced to try the case, the arbitration proceedings would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted." 863 F.2d at 321 (*quoting* ***Sam Reisfeld & Son Import Co. v. S.A. Eteco,*** 530 F.2d 679, 681 (5th Cir. 1976)).

The distinction of ***J.J. Ryan*** relied on by the Court would lead to an anomalous result. Under this Court's analysis of ***J.J. Ryan,*** Plaintiffs could compel Ruhrgas AG to arbitrate the claims which are the subject of this case, but Ruhrgas AG cannot compel Plaintiffs to arbitrate. Either the disputes which are the subject of this case are arbitrable, or they are not. For all of the reasons set forth above, Ruhrgas AG respectfully submits that the Court should find that Plaintiffs are bound to arbitrate their claims under the arbitration clause contained in the Agreement.[8]

C. Conclusion

The claims asserted in this case are based on alleged conduct of Ruhrgas AG directed at Marathon personnel acting *on behalf of MPCN* concerning the adequacy of payments made *to MPCN* which allegedly rendered

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[8] While Plaintiffs have also argued that their claims are not within the scope of the arbitration clause set out in Article 15 of the Agreement, this Court, citing ***Snap-On Tools Corp. v. Mason,*** 18 F.3d 1261, 1265 (5th Cir. 1994), correctly rejected those arguments in the November 15, 1995 Order (Instr. No. 38) at 4 n.1.

MPCN unable to pay its obligations. The MOC and MIOC personnel who negotiated the Agreement on behalf of MPCN clearly agreed that such disputes would be resolved in arbitration under the ICC Rules in Sweden. To allow the Marathon group of companies to avoid the obligation to arbitrate these disputes through the procedural maneuvering which has occurred in this case would allow the corporations of the world to make a mockery of the enforceability of arbitration clauses under the Convention. ***See*** Note Verbale (Ex. 20) at 2. Any arbitration agreement could be circumvented by having a parent company or other affiliate assert claims for indirect derivative damages resulting from the alleged wrongful conduct. Given that the enforcement of arbitration agreements under the Convention is an important function of the federal courts, ***McDermott International, Inc.***, 944 F.2d at 1207-13, and given the important role that arbitration clauses play in the "achievement of the orderliness and predictability essential to any international business transaction," *Scherk*, 417 U.S. at 516, such circumvention should not be permitted. Plaintiffs are bound to arbitrate their claims under the Convention, and this Court has subject matter jurisdiction under 9 U.S.C. § 203 and § 205. The Motion to Remand should be denied.

IV.

DIVERSITY JURISDICTION EXISTS BECAUSE NORGE IS NOT A REAL PARTY IN INTEREST AND WAS FRAUDULENTLY JOINED

MOC and MIOC are U.S. citizens for diversity purposes; Ruhrgas AG is a foreign citizen. Plaintiffs contend that the presence of Norge as a Plaintiff destroys diversity because Norge is a Norwegian corporation. However, Norge's mere presence as a Plaintiff does not end the inquiry.

Removal of a case to a federal district court is appropriate if diversity of citizenship exists among the ***"parties in interest properly joined."*** 28 U.S.C. § 1441(b) (emphasis added). If the Court determines ***either*** (1) that Norge is not a real party in interest, ***or*** (2) that Norge has been fraudulently joined, the citizenship of Norge must be ignored for jurisdictional purposes. ***See Navarro Savings Ass'n v. Lee***, 446 U.S. 458, 460-61 (1980) (jurisdiction rests only upon the citizenship of real parties in interest); ***Burden v. General Dynamics Corp.***, 60 F.3d 213, 217 (5th Cir. 1995) (court must ignore fraudulently joined party for jurisdictional purposes). As shown below, these two independent inquiries yield the same result: Norge must be ignored in determining whether diversity exists in this case.

A. Norge is Not a Real Party in Interest

The 'real party in interest' is the party holding the substantive right sought to be enforced. ***Farrell Const. Co. v. Jefferson Parish***, 896 F.2d 136, 140 (5th Cir. 1990). In

this case, Norge purports to seek enforcement of rights under the Heimdal Field Production License granted by the Norwegian government and under an alleged joint venture agreement with Statoil. As shown more fully below, Norge assigned its rights under both the Production License and the alleged joint venture agreement to MPCN in the 1970s and has not held those rights since. Norge is an inactive company which has not conducted any business since it assigned its rights to MPCN. Because Norge does not hold the substantive rights sought to be enforced, Norge is not a real party in interest.

1. Norge Assigned All of its Rights and Benefits Under the Production License and Operating Agreement to MPCN

The Norwegian government issued a license to Norge[9] and three other companies "to explore for and produce petroleum" in the Heimdal Field in 1971. Petroleum Production License No. 36, ¶ 1 (hereinafter "Production License") (Ex. 56).[10] In June 1975, Norge entered into an Operating Agreement with the other interest owners under the Production License. (Ex. 57). The Operating Agreement is the purported "joint venture agreement" referenced in the First Amended Petition. Bossley Depo. (Ex. 2) at 66-67.[11] Also in June 1975, Norge

[9] Norge was originally named Pan Ocean Norge A/S. Engzelius Depo. (Ex. 3) at 24-25.

[10] The Production License (Ex. 56) was marked as Deposition Exhibit No. 23 at Mr. Engzelius' deposition.

[11] The Operating Agreement was amended on three occasions. Bossley Depo. (Ex. 2) at 68-69. The amendments, which were marked during Mr. Bossley's deposition as Deposition Exhibits 20-22, are attached hereto as Exs. 58, 59, and 60.

assigned to MPCN all rights, benefits, obligations, and duties under the Production License and the Operating Agreement.[12] The terms of this assignment are evidenced in a Pass Through Agreement dated June 25, 1975 (Ex. 61), which was supplemented with a substantively identical Pass Through Agreement effective January 1, 1978 (Ex. 62) (collectively, "Pass Through Agreements"). The Pass Through Agreements provide, in relevant part:

> In return for [MPCN's] performance of its obligations, . . . [MPCN] shall own and receive without additional compensation ***all the rights*** of [Norge] to all the petroleum which may be produced and accumulated under the Production License, and [MPCN] shall be substituted for [Norge] to the extent indicated herein in the Production License, Operating Agreement and Accounting Agreement, as if [MPCN] were expressly named as a party to said Agreements, and ***[MPCN] shall assume all the rights, benefits, obligations and duties of [Norge] under said License and Agreements.***

Pass Through Agreements (Exs. 61 and 62) ¶ 3 (emphasis added). By way of the Pass Through Agreements, Norge unambiguously assigned all rights under the Production License and the Operating Agreement to MPCN. In the July 1980 amendment to the Operating Agreement, the parties expressly acknowledged that under the Pass

[12] At the time of the assignment, MPCN was known as Pan Ocean Oil Corporation (Norway). Engzelius Declaration (Ex. 63) ¶ 7.

Through Agreements, MPCN "receives all the rights and benefits attributable to [Norge's] interest under the Production License No. 036 and the [Operating] Agreement." Ex. 59 ¶ 5. Mr. Engzelius, Norge's chief executive officer and general manager,[13] admitted in his deposition that the Pass Through Agreements remain in effect and have been in effect at all times since their execution. Engzelius Depo. (Ex. 3) at 61, 80. By virtue of the Pass Through Agreements, Norge does not hold and has not held since the 1970s any of the substantive rights and benefits granted by the Production License or the Operating Agreement. Mr. Engzelius admitted in his deposition that the right to explore for, produce, and market the Heimdal Field gas has not been held by Norge at any time since execution of the Pass Through Agreements. ***Id*** at 59-60. In fact, Norge has been an inactive company, with no employees, which conducts no business whatsoever. ***Id.*** at 11-20, 22-24; ***see also*** Exs. 8-19. Even if it is assumed for purposes of argument that Norge continues to hold bare legal title to the Production License, a holder of "naked legal title, with no actual interest or control over the subject-matter of the litigation," is not a 'real party in interest' and does not affect diversity jurisdiction.

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[13] While Mr. Engzelius holds these titles, he is an outside Norwegian lawyer for Marathon who bills his time spent on Norge matters at his normal hourly rate. Engzelius Depo. (Ex. 3) at 12-15, 18-20. The Chairman of the Board for Norge is one of Mr. Engzelius' law partners. ***Id.*** at 20. The address of Norge as reflected on its company certificate is the address of Mr. Engzelius' law firm. ***Id.*** at 18. Mr. Engzelius was designated by Norge as the corporate representative to testify on the jurisdictional issues. ***Id.*** at 4-5, 9.

Stonybrook Tenants Association, Inc. v. Alpert, 194 F. Supp. 552, 556 (D. Conn. 1961).

In short, while Norge seeks to enforce substantive rights under the Production License and the Operating Agreement, Norge assigned those rights to MPCN pursuant to the Pass Through Agreements, which Norge admits are still in effect. Because Norge does not hold the substantive rights sought to be enforced, Norge is not a real party in interest. ***Farrell Const.,*** 896 F.2d at 140.

2. If Norge Holds Anything, it is Nothing More Than a Possibility of Reverter, Which Does Not Make Norge a Real Party in Interest

Plaintiffs attempt to avoid the Pass Through Agreements by arguing that Norge retains a "remainder" interest, or alternatively, a "reversionary" interest in the Production License and Operating Agreement by virtue of paragraph 9 of the Pass Through Agreements, which provides:

> If [MPCN] defaults on any provisions of this Agreement, [Norge] shall have the right to terminate the Agreement with immediate effect.

Pass Through Agreements (Exs. 61 and 62) ¶ 9. However, Mr. Engzelius admitted in his deposition that (1) MPCN has not defaulted; (2) Norge has not terminated the Pass Through Agreements; (3) Norge has not had and does not have the current right to terminate the Pass Through Agreements; and (4) Norge may never terminate the Pass Through Agreements. Engzelius Depo. (Ex. 3) at 78-80, 85-91. As shown below, the speculative possibility that Norge *may* at some future date terminate the Pass

Through Agreements and reacquire the rights under the Production License and the Operating Agreement does not make Norge a real party in interest in this case.

As a threshold matter, Plaintiffs mischaracterize Norge's speculative possibility of reacquiring the rights under the Production License as a "remainder." Plaintiffs' Brief in Support of Their Motion to Remand (Instr. No. 13) at 4. Norge cannot hold a remainder interest in the Production License because the grant of a "remainder" creates an interest in a third party and cannot be reserved by a grantor. ***Bradford v. Rain,*** 562 S.W.2d 514, 518 (Tex. Civ. App. – Texarkana 1978, no writ); 31 C.J.S. *Estates* § 68 at 142. Plaintiffs alternatively assert that Norge retained a reversionary interest in the Production License. Plaintiffs' Brief in Support of Their Motion to Remand (Instr. No. 13) at 4. A "reversionary interest" is any future interest left in a grantor or his successors. RESTATEMENT OF THE LAW OF PROPERTY § 154 (1936); 31 C.J.S. *Estates* § 105 at 203; 2A RICHARD R. POWELL, POWELL ON PROPERTY ¶ 270[1] (Patrick J. Rohan ed. 1995).

There are, however, two types of reversionary interests: a "reversion" and a "possibility of reverter." RESTATEMENT OF THE LAW OF PROPERTY, § 154. A "reversion" exists in a grantor when it is certain that the interest will revert to the grantor at a future date. ***Id.*** A "possibility of reverter," on the other hand, is the interest retained if the grant might remain in effect forever, or instead might terminate if a specified contingency occurs. ***Id.; Luckel v. White,*** 819 S.W.2d 459, 464 (Tex. 1991); ***Davis v. Skipper,*** 83 S.W.2d 318, 320 (Tex. Comm'n App. – 1935, opinion adopted); ***James v. Dalhart Consol. Indep. School Dist.,*** 254 S.W.2d

826, 829 (Tex. Civ. App. – Amarillo 1952, writ ref'd); 31 C.J.S. *Estates* § 105 at 203.

The distinction between a "reversion" and a "possibility of reverter" is important where a question concerning the right to assert a lawsuit is raised, because "[t]he holder of a bare possibility of reverter cannot maintain an action for injury to the property and may not join as a party plaintiff in such an action." 31 C.J.S. *Estates* § 105, at 205;[14] ***see also Layne Louisiana Co. v. Superior Oil Co.,*** 26 So.2d 20, 24 (La. 1946) (where interest in minerals might never revert to plaintiff, plaintiffs interest was too speculative to form the basis for an award of damages); ***Hopper v. Barnes,*** 45 P. 874, 876 (Cal. 1896) (holder of possibility of reverter not entitled to maintain an action for injury to property); *cf.* ***Davis v. Skipper,*** 83 S.W.2d at 320 (holder of possibility of reverter in minerals may not maintain action against holder of possessory interest in minerals for waste). The RESTATEMENT OF THE LAW OF PROPERTY specifically provides that with respect to both real property and personal property interests, an action for damages for injury to the property may be maintained by the holder of a future interest only if the future interest is an indefeasible reversion or an indefeasibly vested remainder. RESTATEMENT OF THE LAW OF PROPERTY § 214, cmt. b, § 215, cmt. c. A possibility of reverter is neither. ***Id.*** § 154. As shown below, even if it is assumed that Norge

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[14] Plaintiffs cite 31 C.J.S. *Estates* in their Brief in Support of Their Motion to Remand (Instr. No. 13) at 23, but neglect to mention the clear statement therein that the holder of a possibility of reverter may not bring an action for injury to the property.

holds a reversionary interest in the Production License, such an interest could only be characterized as a "possibility of reverter."

The Production License will revert to Norge *only* if MPCN defaults on a provision of the Pass Through Agreements, and only then if Norge elects to terminate the Pass Through Agreements under paragraph 9 thereof. Pass Through Agreements (Exs. 61 and 62) ¶ 9; *see* Engzelius Depo. (Ex. 3) at 78-80, 85-91. While Plaintiffs suggest in their Brief in Support of Their Motion to Remand that the rights under the Production License will revert to Norge in June 1996, the effective date of MPCN's attempted termination of the Agreement, Mr. Engzelius affirmatively refutes this assertion. Even if it is assumed that the Agreement terminates in June 1996 (a contention which Ruhrgas AG denies since all of the buyers have rejected such termination as invalid), Mr. Engzelius concedes that MPCN still may secure a new buyer for the Heimdal gas and retain all rights under the Production License. Engzelius Depo. (Ex. 3) at 85-86; Declaration of Finn E. Engzelius ¶ 9 (Ex. 63). Accordingly, any anticipation that Norge will regain the rights under the Production License in June 1996 is mere speculation. Mr. Engzelius admitted in his deposition testimony that it is impossible to say whether MPCN will ever default on its obligations under the Pass Through Agreements. ***Id.*** at 87. Mr. Engzelius acknowledged that the rights to explore for, produce, and market the Heimdal Field gas may never revert to Norge. Engzelius Depo. (Ex. 3) at 59-60, 85-91. The mere possibility that Norge someday may regain those rights is, at most, a possibility of reverter. As the holder of nothing more than a possibility of reverter,

Norge is not a real party in interest and must be disregarded in determining diversity jurisdiction.

B. Norge is Fraudulently Joined

In order to establish fraudulent joinder, the party seeking removal to federal court need not prove actual fraud; it is sufficient to show there is no possibility that the plaintiff will be able to establish a cause of action against the non-diverse defendant in state court. ***Burden v. General Dynamics Corp.,*** 60 F.3d 213, 217 (5th Cir. 1995). Although courts have traditionally applied fraudulent joinder where a party seeks to join a non-diverse defendant, the doctrine also applies where a non-diverse plaintiff joins the action to defeat diversity jurisdiction. ***See Vidmar Buick Co. v. General Motors Corp.,*** 624 F. Supp. 704, 707 (N.D. Ill. 1985); ***Picquet v. Amoco Prod. Co.,*** 513 F. Supp. 938, 943 (M.D. La. 1981).

In evaluating a fraudulent joinder claim, the court may "pierce the pleadings," and consider affidavits, deposition transcripts and other evidentiary material. ***Burden,*** 60 F.3d at 217. If the court concludes that there is no possibility that the state court would recognize a valid cause of action, the claim is fraudulent and will not preclude removal. ***Id.*** at 217-18.

Even accepting Plaintiffs' factual allegations as true (and they are not), there is no possibility that Norge could prevail on its tort claims against Ruhrgas AG in Texas state court. Accordingly, Norge is fraudulently joined and must be ignored for purposes of diversity jurisdiction.

1. Norge Has No Possibility of Recovery Because It Does Not Hold the Substantive Rights Sought to be Enforced

As shown above, Norge assigned to MPCN in the 1970s the substantive rights sought to be enforced in this case. Even if it is assumed that paragraph 9 of the Pass Through Agreements creates a reversionary interest in Norge in the Production License and Operating Agreement, such a reversionary interest could only be characterized as a possibility of reverter because it is undisputed that the rights thereunder may never revert to Norge. Engzelius Depo. (Ex. 3) at 78-80, 85-91. As previously discussed, a holder of a possibility of reverter may not bring a tort claim for alleged injury to the property because of the speculative nature of the interest. As a result, Norge has no possibility of recovering on its claims in state court, and must be ignored for purposes of diversity jurisdiction. ***Burden,*** 60 F.3d at 217-18.

2. Norge's Claims Also Fail For Other Independent Reasons

While the First Amended Petition is less than clear, it appears that the specific claims asserted by Norge are for tortious interference and for participation in a breach of fiduciary duty. Norge has no possibility of recovery on either of these claims, independent of the fact that Norge owns no legally protectable interest.

a. Norge's Purported Tortious Interference Claims

In Plaintiffs' First Amended Petition, Plaintiffs assert that Ruhrgas AG has allegedly interfered with the prospective business relations of "Marathon's affiliate," MPCN. Plaintiffs' First Amended Petition ¶¶ 42-48. Curiously, Plaintiffs now contradict the First Amended Petition by contending that Norge is seeking damages for Ruhrgas AG's alleged "interference with Norge's ability to realize the value of its license." Plaintiffs' Brief in Support of Their Motion to Remand (Instr. No. 13) at 5. Although this latter assertion is not supported by the First Amended Petition, it is immaterial whether the tortious interference claim relates to alleged interference with Norge's prospective business relations and/or to alleged interference with MPCN's prospective business relations, because Norge has no possibility of recovery on either claim as a matter of law.

i. Tortious Interference With MPCN's Prospective Business Relations

A corporation cannot pursue a claim for tortious interference with the business relations of its affiliate. ***Diesel Systeins, Ltd. v. Yip Shing Diesel Engineering Co., Ltd.,*** 861 F. Supp. 179, 181 (E.D.N.Y. 1994); ***Osborn v. Bell Helicopter Textron, Inc.,*** 828 F. Supp. 446, 450-51 (N.D. Tex. 1993). It is axiomatic that a plaintiff "generally must assert his own legal rights and cannot rest his claim to relief on the legal rights or interests of third parties." ***Warth v. Seldin,*** 422 U.S. 490, 499 (1975). Norge has no

possibility of recovery on a claim for tortious interference with *MPCN's* business relations.

ii. Tortious Interference With Norge's Prospective Contractual Relations

Plaintiffs assert in their Brief (but not in their First Amended Petition) that Ruhrgas is interfering "with Norge's ability to realize the value of its license." Plaintiffs' Brief in Support of Their Motion to Remand (Instr. No. 13) at 5. This allegation is curious in light of Mr. Engzelius' admission that there has been no contact whatsoever between Ruhrgas AG and Norge on transportation issues or any other issue for that matter. Engzelius Depo. (Ex. 3) at 107-8. In any event, these allegations cannot support any recovery in favor of Norge in light of the undisputed facts of this case.

A claim for tortious interference requires a "reasonable probability" that the plaintiff would have entered into a contractual or business relationship absent interference by the defendant. ***Conticommodity Services, Inc. v. Ragan,*** 63 F.3d 438, 443 (5th Cir. 1995). A plaintiff asserting such a cause of action "must show that negotiations . . . were under way and appeared likely to succeed or reasonably certain to result in a contract advantageous to the [plaintiff]." ***United Teacher's Associates v. Mackeen & Bailey, Inc.,*** 847 F. Supp. 521, 535 (W.D. Tex. 1994). It is undisputed that Norge has not engaged in any negotiations to contract with a third party to market and/or sell the gas from the Heimdal field. Engzelius Depo. (Ex. 3) at 91. In fact, Mr. Engzelius admitted that Norge currently does not have the right to secure a buyer for the

Heimdal gas. ***Id.*** at 60. Further, Norge has not engaged in any negotiations to convey any reversionary interest. ***Id.*** at 98. In the absence of negotiations, there can be no reasonable probability that Norge would have been successful in negotiating a sale of the gas or a sale of any interest which it may hold. ***United Teacher's,*** 847 F. Supp. at 535. As a matter of law, Norge has no possibility of prevailing on a claim for interference with its own prospective business relations, even if Norge's standing problems are disregarded and even if it is assumed that such a claim is set forth in the First Amended Petition, which it is not.

iii. No Damages

One of the elements for recovery on a cause of action for interference with prospective business relations is the existence of actual damages. ***Ragan,*** 63 F. 3d at 443. The undisputed facts demonstrate that Norge has suffered none.

Mr. Engzelius testified that pass through arrangements of the type utilized by Marathon with respect to the Heimdal Field were "general practice" in the 1970s and were designed to enable the producer to take advantage of U.S. tax benefits. Engzelius Depo. (Ex. 3) at 50-51. The plan was that the Norwegian company (Norge) would acquire the license and would assign the rights under the license to a U.S. affiliate (MPCN), which would develop the property, produce the gas, sell the gas, and realize all of the profits, until the field was fully depleted, taking advantage of the tax benefits available under U.S. law along the way. ***Id.*** at 50-52, 58. Mr. Engzelius

acknowledged that if the pass through arrangement utilized here proceeded as planned, Norge would never sell any gas from the Heimdal Field, and MPCN would realize all of the proceeds of sale of such gas until the field was depleted. ***Id.*** at 58. Norge never had any reasonable expectation of realizing any benefits in connection with the development of the Heimdal Field.

Consistent with the intent of the pass through arrangement, Norge in fact has not held the right to explore for, produce or sell gas in the Heimdal Field since the 1970s. Engzelius Depo. (Ex. 3) at 59-60. The income, expenses, assets, and liabilities of Norge have not been affected by any matters relating to the Heimdal Field. Engzelius Depo. (Ex. 3) at 72-83, 106-107, 109-110; Exs. 8-19. Norge has not been required to discharge any of the obligations under the Production License since the execution of the Pass Through Agreements, and may never be required to discharge any of those obligations. Engzelius Depo. (Ex. 3) at 78, 109-110, 119-121. These undisputed facts conclusively demonstrate that Norge has suffered no damages.

Norge asserts that it has future damages based on its contention that the value of its reversionary rights have been damaged. However, Norge had no reasonable expectation that it would ever realize *any* value from its alleged reversionary rights. As noted above, the intent of the pass through arrangement was to allow MPCN to fully develop the field until it was depleted, with Norge realizing *none* of the proceeds of sale. Engzelius Depo. (Ex. 3) at 58. In any event, the alleged wrongful conduct of Ruhrgas AG allegedly committed during the course of its dealings with MPCN could have no possible effect on

the value of the rights under the Production License and Operating Agreement, even if it is assumed for purposes of argument that such a reversion will occur in the future. Mr. Engzelius admitted that the value of the rights upon a reversion to Norge would not be affected by the price paid prior to the reversion. Engzelius Depo. (Ex. 3) at 96-97. Norge would be free to sell the gas to any buyer it chooses at a price that would be negotiated at arm's length. ***Id.*** at 97-98. Norge's right upon reversion to sell the gas at a freely negotiated price would exist notwithstanding anything that happened in the dealings between Ruhrgas AG and MPCN. ***Id.*** at 98. Ruhrgas AG's alleged failure to pay a premium price to MPCN could have no possible adverse effect on the value of the rights upon reversion to Norge (if such a reversion ever occurs). Finally, because the rights under the Production License and Operating Agreement may *never* revert to Norge, any alleged damage to the reversionary interest is too speculative to be recoverable. ***Layne Louisiana Co. v. Superior Oil Co.,*** 26 So.2d at 24; ***Hopper v. Barnes,*** 45 P. at 876; Restatement of the Law of Property § 214, cmt.b, § 215, cmt. c. As such, Norge has no damages, and therefore has no possibility of recovery on any tortious interference claim.

b. Norge's Claim For "Participation" of Ruhrgas AG in a Breach of Fiduciary Duty by Statoil

Norge apparently asserts a claim based on alleged participation of Ruhrgas AG in an alleged breach of fiduciary duty by Statoil. First Amended Petition ¶¶ 50-58. Ruhrgas AG has been unable to find any

authority suggesting that Texas recognizes a cause of action for participation in a breach of fiduciary duty by another. Judge Hittner, in ***Resolution Trust Corp v. Bonner,*** 1993 WL 414679 (S.D. Tex. June 3, 1993) (Ex. 64), also was unable to find any such authority and dismissed such a claim.

Nevertheless, even if it is assumed that such a cause of action exists, any such claim by Norge nevertheless fails as a matter of law. Norge assigned all of its rights under the Operating Agreement (the purported "joint venture agreement") to MPCN by way of the Pass Through Agreements. Pass Through Agreements (Exs. 61 and 62) ¶ 3. The July 1980 Amendment to the Operating Agreement expressly acknowledges that under the Pass Through Agreements, MPCN "receives all the rights and benefits attributable to [Norge's] interest under . . . the [Operating] Agreement." Ex. 59, ¶ 5. Mr. Engzelius admitted in his deposition that Norge's rights under the Operating Agreement are "suspended" by virtue of the Pass Through Agreements. Engzelius Depo. (Ex. 3) at 76. Even if it is assumed for purposes of argument that the Operating Agreement gives rise to fiduciary obligations on the part of the parties thereto, Norge has no rights relative thereto by virtue of the Pass Through Agreements.

This conclusion is consistent with the papers filed by MPCN in the proceedings which it has initiated in Stavanger, Norway against Statoil and the other owners of Statpipe. MPCN alleges in those proceedings that *MPCN is the joint venturer.* Exhibit 5 ¶ 1.3. Norge is not a party to those proceedings. Engzelius Depo. (Ex. 3) at 100. In fact, Mr. Engzelius testified that he was unaware

of any claims, demands, or allegations made against Statoil by Norge. ***Id.*** at 99. The MPCN filing in Stavanger not only makes it clear that Norge has no claims as a joint venturer, it demonstrates that the assertion of such claims in this proceeding by Norge could only have been motivated by a desire to defeat diversity. While a fraudulent motive is not necessary to establish fraudulent joinder, such a motive nevertheless is present here.

Finally, the fiduciary duty claims fail because of the absence of any cognizable damages. Absent damages, any claims based on breach of fiduciary duty fail as a matter of law. ***Rowe v. Rowe,*** 887 S.W.2d 191, 196 (Tex. App. – Fort Worth 1994 writ denied). The detailed discussion of the damage issues relevant to the tortious interference claims *(see supra* at 39-41) applies equally to the breach of fiduciary duty claims.

C. Conclusion

In summary, Norge does not own the substantive rights sought to be enforced in this case, and has not owned those rights at any relevant time. Those rights may never revert to Norge. Norge has engaged in no activities related to the Heimdal Field, and never expected to engage in any such activities. Norge's financial position has not been impacted whatsoever by any matters relating to the Heimdal Field. Norge had no reasonable expectation that it would ever realize any value from rights under the Production License or the Operating Agreement. Under these circumstances, Norge has no possibility of recovery, and Norge must be disregarded in determining whether diversity jurisdiction

exists. Because diversity exists in the absence of Norge, the Motion to Remand should be denied.

V.

FEDERAL QUESTION JURISDICTION EXISTS BECAUSE THE CASE RAISES QUESTIONS OF FOREIGN AND INTERNATIONAL RELATIONS WHICH ARE INCORPORATED INTO AND FORM PART OF THE FEDERAL COMMON LAW

A. Plaintiffs Misconstrue Ruhrgas AG's Third Basis of Removal Jurisdiction

Plaintiffs argue that Ruhrgas AG has improperly removed the action pursuant to the Foreign Sovereign Immunities Act ("FSIA"). Plaintiffs' Brief in Support of Their Motion to Remand (Instr. No. 13) at 8. Ruhrgas AG is *not* removing pursuant to the FSIA, which should have been apparent to Plaintiffs because Ruhrgas AG does not cite the FSIA anywhere in its removal notice. Rather, as shown below, Plaintiffs' claims raise substantial questions of foreign and international relations, which are incorporated into and form part of federal common law, creating federal question jurisdiction.

B. Foreign Relation Questions Create Federal Question Jurisdiction

Federal question jurisdiction in the action exists because of the serious foreign relations implications created by Plaintiffs' claims. For purposes of determining if a case is one "arising under" the Constitution or laws of the United States, the word "laws" includes federal common law. ***Illinois v. City of Milwaukee,*** 406 U.S. 91, 100

(1972); ***see also*** RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 112 (1987). It is well settled that claims raising questions of foreign relations are incorporated into federal common law. ***Banco Nacional de Cuba v. Sabbatino,*** 376 U.S. 398, 425 (1964); ***Republic of Philippines v. Marcos,*** 806 F.2d 344, 352 (2d Cir. 1986), *cert. dismissed,* 480 U.S. 942, and *cert. denied,* 481 U.S. 1048 (1987); ***Kern v. Jeppesen Sanderson, Inc.,*** 867 F. Supp. 525, 531-32 (S.D. Tex. 1994); ***Sequihua v. Texaco, Inc.,*** 847 F. Supp. 61, 62-63 (S.D. Tex. 1994); ***Grynberg Prod. Corp. v. British Gas P.L.C,*** 817 F. Supp. 1338, 1355 (E.D. Tex. 1993); ***see also*** RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 112 (1987). Plaintiffs' claims raise such foreign and international concerns.

C. Plaintiffs' Claims Raise Substantial Questions of Foreign Relations

The existence and substantiality of the international and foreign relations questions raised by Plaintiffs' claims is demonstrated by the opposition of the Federal Republic of Germany to Plaintiffs' action as stated in a diplomatic note (Note Verbale) (Ex. 20), and in its Brief as Amicus Curiae in Support of Ruhrgas (Instr. No. 58). The Note Verbale identifies a number of substantial international and foreign relations concerns raised by Plaintiffs' claims:

- Germany has a strong public interest in secure and reasonably priced energy supplies. Because natural gas provides a substantial proportion of Germany's energy supplies and 80 percent of the gas must be imported, natural gas imports are a major

issue in national energy policy. Imports from Norway are particularly important. As Germany's Minister of Economics, Dr. Guenter Rexrodt, stated on April 20, 1994, in a public speech "For Germany, Norway is a particularly important partner in energy supplies. There is no other country from which we buy comparable quantities of energy (oil and gas). We do not see any reason for concern about our growing dependence on Norwegian energy supplies; *for it is founded on the sound and reliable basis of amicable political relations and close cooperation of the companies involved.*"

- Natural gas imports into Germany are governed by long-term import agreements to ensure an uninterrupted supply. On the German side, the agreements are concluded by companies that are monitored by the national energy authorities. Due to their long-term impact on economic stability, these agreements are subject to state approval pursuant to the German Foreign Trade and Payments Act.

- The gas pipelines linking Norwegian fields to Germany are an important issue for both states. The governments of Germany and Norway concluded bilateral treaties in 1974 and 1993 to define the sovereign powers of the two states with regard to the pipelines from the Norwegian continental shelf to the German coast.

- The government of the Federal Republic of Germany considers it extremely important that the terms and conditions of natural gas import agreements be strictly complied with.

If gas supplied by one European state to another European state gives rise to a dispute between the companies involved, such disputes must be settled in strict accordance with the contractual agreements so as to maintain confidence in the reliability of international trade relations. An energy-importing country like the Federal Republic of Germany must place special emphasis on this principle.

- If the legal opinion came to prevail that in international trade a party to a contract can avoid binding contractual agreements, such as, in this case, prices and the arbitration clause, by having affiliated companies not directly bound by these contractual agreements file an action for damages in a forum non conveniens and if such forum were to rule on the merits of the case, the reliability of international legal and commercial relation would be gravely affected.

- The availability of natural gas from Norwegian reserves for the German market is based on good and amicable relations between the Kingdom of Norway and the Federal Republic of Germany. *Since Norway has rich natural gas reserves and Germany is dependent on energy imports, disputes arising in connection with natural gas supplies from Norway to Germany may have undesirable affects on relations between the two countries.* It is not the least for this reason that the government of the Federal Republic of Germany deems it appropriate and essential to provide for the settlement of any dispute by arbitration in an

> international court of arbitration. It is therefore standard practice in Europe to incorporate an arbitration clause in all agreements on natural gas imports from Norway. An attempt to bypass such an arbitration clause should be doomed to failure.

Ex. 20 (emphasis added). The Federal Republic of Germany shows in its Amicus Brief that "the critical national interests of Germany . . . are implicated in this case." Amicus Brief of Germany (Instr. No. 58) at 6 (emphasis added).

The substantial nature of the international interests at stake are further demonstrated by statements of Mr. Thorvald Stoltenberg, Norwegian Minister of Foreign Affairs: "Norwegian gas supplies are stable and dependable and thereby contribute to West European energy security. *The foreign policy factor is also present in gas negotiations and Norwegian authorities will monitor these closely.*" Ex. 65 (emphasis added). In fact, the Federal Republic of Germany and Norway entered into a Protocol in 1976 concerning cooperation in the exploration, production, and transportation of hydrocarbons. Ex. 66.

Even MPCN has acknowledged the implications of the matters in dispute on foreign and international relations. In the European Commission Complaint served by MPCN against Statoil and Statpipe, MPCN notes that the Statpipe transportation system through which the Heimdal gas flows "provides one of the main links between the Norwegian Continental Shelf and the European Union and the only link between Heimdal and Continental Europe." Ex. 6 ¶ 63. MPCN also acknowledges that the

Heimdal gas represents approximately "13% of the Norwegian gas sold in the Common Market." ***Id.*** MPCN concludes that the matters in dispute "affect trade between Member States [of the European Union] and . . . competition in the Common Market must consequently be regarded as substantially affected." Ex. 6 ¶ 64. MPCN requests intervention of the European Commission to address matters which MPCN alleges will result in "restricted sources of supply for consumers in the European Union" and which are "clearly intolerable for the public interest." Ex. 6 ¶ 71.

A trio of recent Texas federal district court cases has held removal jurisdiction existed on federal question grounds when similar foreign and international interests were at issue. ***Kern,*** 867 F. Supp. at 531; ***Sequihua,*** 847 F. Supp. at 62-63; ***Grynberg,*** 817 F. Supp at 1365. In ***Kern, Sequihua,*** and ***Grynberg,*** foreign sovereigns were *not* parties. Instead, the court in each case found that the subject matter of the dispute raised international and foreign relations concerns implicating federal question jurisdiction.

1. *Kern v. Jeppesen Sanderson, Inc.*, 867 F. Supp. 525 (S.D. Tex. 1994)

In ***Kern,*** the court held that there was an *independent* basis of federal question jurisdiction "because plaintiffs claims raise questions of foreign relations which are incorporated into federal common law." ***Id.*** at 531. The court noted "the fact that foreign countries are not specifically named in the lawsuit is *immaterial.*" ***Id.*** (emphasis added). The foreign interest that sustained federal court

jurisdiction in ***Kern*** (which involved two airplane crashes in Nepal) arose from the interest of other countries in the subject matter of the suit:

> The interest these foreign sovereigns have in regulating their aircraft, airlines and airspace outweighs any interest the United States may have in applying its own air safety regulations to these defendants. "[E]very State has complete and exclusive sovereignty over the air space above its territory." Convention on International Civil Aviation, article 1. They also control the standards for safety and airworthiness within their country. ***Id.*** at article 38. ***Since the interests of foreign countries in this litigation are substantial, there is federal question jurisdiction.***

Id. at 532 (citing ***Grynberg,*** 817 F. Supp. at 1338, 1353-54) (emphasis added).

Plaintiffs offer an incomplete and inaccurate explanation of ***Kern,*** stating that plaintiffs' complaint in ***Kern*** arose under a "federal treaty" thereby creating federal question jurisdiction only on that ground. Plaintiffs' Brief in Support of Their Motion to Remand (Instr. No. 13) at 10 n.2. Although that was one basis of jurisdiction in ***Kern,*** the ***Kern*** court also found federal question jurisdiction existed, independently, because of the "international issues" in the case. ***Kern,*** 867 F. Supp. at 531-32.

2. *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S. D. Tex. 1994)

Sequihua involved an action brought by Ecuadoran citizens for pollution allegedly caused in Ecuador. ***Id.*** at 62. The ***Sequihua*** court held:

> Based upon the important foreign policy implications of this case, upon the international legal principle that each country has the right to control its own natural resources, and the strong opposition expressed by the Republic of Ecuador to this litigation, the Court finds without reservation that Plaintiffs' state law claims, if well-pleaded, raise issues of international relations which implicate federal common law. Consequently, this Court has federal question jurisdiction and the motion to remand must be denied.

Id. at 63. Plaintiffs attempt to distinguish ***Sequihua*** by noting that plaintiffs' action "spurred a formal protest from that country's government." Plaintiffs' Brief in Support of Their Motion to Remand (Instr. No. 13) at 10 n.2. With the filing of the Note Verbale (Ex. 20) and Amicus Curiae Brief of the Federal Republic of Germany (Instr. No. 58), ***Sequihua*** is obviously not distinguishable in this respect.

3. Grynberg Production Corp. v. British Gas Corp., 817 F. Supp. 1338 (E.D. Tex. 1993).

Grynberg involved a dispute over the right to develop mineral resources. ***Id.*** at 1341. The court found federal question jurisdiction based on the presence of substantial international relations questions, noting that "the government of the Republic of Kazakhstan has taken the time and effort to write this court with respect to this case." ***Id.*** at 1356.

This case implicates international relations. Under the authorities discussed above, federal question jurisdiction exists in this Court. The Motion to Remand should be denied.

VI.
CONCLUSION

Several independent bases exist for sustaining the removal of this case to federal court and denying Plaintiffs' Motion to Remand. For the reasons stated herein and in the Brief for the Federal Republic of Germany as Amicus Curiae in Support of Ruhrgas, the Court should deny Plaintiffs' Motion to Remand.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Ruhrgas AG respectfully requests the opportunity to present oral argument on Plaintiffs' Motion to Remand.

/s/ Ben H. Sheppard, Jr.
Ben H. Sheppard, Jr.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on counsel of record for Plaintiffs by certified mail, return receipt requested this 8th day of February, 1996.

/s/ Ben H. Sheppard, Jr.
BEN H. SHEPPARD, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, and MARATHON PETROLEUM NORGE A/S Plaintiffs, RUHRGAS, A.G. Defendant.	§ § § § § § § § § §	CIVIL ACTION NO. H-95-4176

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO REMAND

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MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, and MARATHON PETROLEUM NORGE A/S	§	**CIVIL ACTION NO. H-95-4176**
Plaintiffs,	§	
RUHRGAS, A.G.	§	
Defendant.	§	

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO REMAND

Plaintiffs Marathon Oil Company ("MOC"), Marathon International Oil Company ("MIOC"), and Marathon Petroleum Norge A/S ("Norge") submit this reply brief in support of their Motion to Remand and renew their request for just costs including attorneys' fees.

Summary of Argument

Removal is a creature of federal statutes, all of which are strictly construed *against* removal. Because the very concept of removal runs counter to deeply embedded notions of state sovereignty and the plaintiff's right to

select its forum, *any* doubts concerning the facts or the controlling law are resolved in favor of remanding the case to the forum in which it was filed. Ruhrgas contends that this case is removable for three reasons: (1) because its arbitration agreement with Marathon Petroleum Company Norway ("MPCN") (an affiliate of Plaintiffs, but not a party to this case) allegedly creates a federal question pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards; (2) because this case supposedly raises "international issues" such that there must be federal question jurisdiction under federal common law; and (3) because Norge, the only non-diverse plaintiff, allegedly cannot possibly prevail on any claim, regardless of the facts. None of these assertions are true.

Ruhrgas' arbitration agreement with MPCN does not create federal question jurisdiction because that agreement has no application whatsoever to Plaintiffs. Plaintiffs never have agreed to arbitrate their claims and they are not parties to the arbitration agreement. Moreover, the terms of the arbitration agreement itself unambiguously *exclude* any application to Plaintiffs. Ruhrgas' attempt to rely on French authority referring to a "group of companies" doctrine is contrary to settled federal law and ignores the law of corporations and rules of contract interpretation as they are known in this country. This Court already has ruled that Ruhrgas' arbitration agreement with MPCN has no application here, and Ruhrgas' Response adds nothing new to this already over-briefed issue.

That Ruhrgas convinced its own government to file a Note Verbale with the State Department and an *amicus*

brief here does not transform Plaintiffs' state tort claims into federal questions. None of Plaintiffs' claims are based on federal law, and none require the resolution of federal issues. Furthermore, the issues of so-called national or international importance to the Federal Republic of Germany vanish under even the slightest scrutiny. All Ruhrgas has demonstrated is that the German government wants it to win. That fact, although undeniably true, hardly creates federal jurisdiction.

Finally, Norge was not fraudulently joined. It is undisputed that Norge owns legal title to the Production License for the Heimdal field. It also owns the unproduced gas in that block, and remains liable to its co-venturers and the Norwegian government for a host of liabilities set out in the terms of the License. Although MPCN is required to perform Norge's obligations under that License by virtue of a Pass Through Agreement, Ruhrgas is preventing MPCN from doing so. As a result, MPCN already has been forced to terminate its Gas Sales Agreement with Ruhrgas, and that termination will become effective in June of this year. Ruhrgas also is preventing MPCN from securing any other buyers for Heimdal gas, thereby ensuring that MPCN will default under the Pass Through Agreement. Thus, by the terms of the Pass Through Agreement, any rights and obligations previously assigned to MPCN will revert to Norge in four months. This is not merely a "possibility of reverter;" instead, Ruhrgas' actions have rendered reversion a certainty. In any event, Norge claims that Ruhrgas' actions have damaged the value of the Production License and the unproduced gas it unquestionably owns.

It also seeks to hold Ruhrgas liable for knowingly participating in Statoil's breach of fiduciary duty. Assuming Norge proves these allegations at trial, it obviously can recover damages for such claims. Thus, Norge was not "fraudulently joined" under any accepted definition, and complete diversity does not exist.

Factual Corrections and Disputes

Plaintiffs dispute a number of Ruhrgas' factual allegations, most of which bear little significance to the remand issue. For example, Ruhrgas contends that because a team of MOC employees negotiated the Gas Sales Agreement on behalf of MPCN, they necessarily divorced themselves entirely from any affiliation with MOC. According to Ruhrgas, any misrepresentations or omissions it made were made to MPCN, not MOC – even though the persons to whom they were speaking were MOC employees. The facts, however, demonstrate that Ruhrgas was well aware that it was dealing with MOC representatives, that Ruhrgas knew and expected that MOC would have to approve major expenditures, and that Ruhrgas knew MOC was providing the funds for MPCN's Heimdal operations.[1] Indeed, Ruhrgas itself acts as a lender to its own subsidiaries for projects conducted abroad.[2]

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[1] These matters are discussed at length in Plaintiffs' Response to Ruhrgas' Motion to Dismiss for Lack of Personal Jurisdiction at pages 11-13. *See also* the Exhibits referred to in that discussion.

[2] Hoffmann Deposition at 188:9-13 (attached as Exhibit 1 to Plaintiffs' Response to Ruhrgas' Motion to Dismiss for Lack of Personal Jurisdiction).

Ruhrgas' representations about other actions MPCN is "prosecuting" in Europe also are inaccurate. MPCN has filed suit in Stavanger, Norway against the companies that own Statpipe, charging that Statpipe's pipeline tariff rates are working an unreasonable hardship on MPCN.[3] The suit seeks a reduction in tariff rates. None of the relief being sought is duplicative in any respect to the relief being sought here. MPCN is the plaintiff in that action, Ruhrgas is *not* a defendant, and the causes of action relate solely to a transportation agreement to which MPCN is a party. In short, the Statpipe action is entirely distinct from the parties and claims in this case.

Ruhrgas' assertion that MPCN is prosecuting a claim before the European Commission is simply wrong; no such action has been filed.[4] In any event, such an action would be criminal in nature, similar to lodging a complaint with the FTC in America. It could not seek civil damages for MPCN or any of the Plaintiffs.

Of course, none of these facts are relevant to the issues currently before the Court. Ruhrgas has simply inserted these allegations in an attempt to bolster its main complaint – that MPCN should be a plaintiff here and that this case should be sent to arbitration. But Ruhrgas ultimately must acknowledge a few simple truths:

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[3] A copy of the Statpipe suit is attached to Ruhrgas' Response as Exhibit 5.

[4] The document attached as Exhibit 6 to Ruhrgas' Response is merely a draft complaint, as it expressly states at the top of the third page of the exhibit. It has not been filed.

- First, MPCN is *not* a plaintiff in this case. There is nothing untoward or improper about that fact; nothing requires MPCN to sue Ruhrgas.

- Second, MOC, MIOC and Norge have asserted their *own* claims in this case, *not* hypothetical claims that MPCN could have asserted if it had filed suit. In fact, all of the claims Plaintiffs are asserting would remain regardless of whether MPCN had ever existed. Each of the actual Plaintiffs is entitled to pursue its own claims, and each may select which claims it chooses to bring.

- Third, Ruhrgas has no arbitration agreement with MOC, MIOC or Norge – and the terms of its agreement with MPCN *exclude* those companies from the arbitration provision.

As will be further demonstrated below, many other "facts" are hotly contested between the parties, and all must be resolved in favor of remand.

ARGUMENT

I. The Burden of Sustaining Removal

Removal is a question of statutory construction, and, because removal jurisdiction is generally disfavored, statutes authorizing removal are strictly construed against removal. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941); *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 524 (5th Cir. 1994). The defendant has the burden to show that removal was proper and any doubts concerning the facts or the controlling law are resolved in favor of remand. *E.g., Lackey v. Atlantic Richfield Company*, 990 F.2d 202, 206 (5th Cir. 1993). The basis for the removal is to be

stated with clarity in the Notice of Removal. Only technical amendments are permitted thereafter. *Wyant v. National R.R. Passenger Corp.*, 881 F. Supp. 919, 924-25 (S.D.N.Y. 1995); *Zaini v. Shell Oil Co.*, 853 F. Supp. 960, 964 & n.2 (S.D. Tex. 1994); *Castle v. Laurel Creek Co.*, 848 F. Supp. 62, 64-65 (S.D. W. Va. 1994).[5]

Ruhrgas goes to great lengths to suggest that Plaintiffs' refusal to pursue other claims or to include other parties is "improper," arguing that Plaintiffs' claims are nothing more than artful pleading. The "artful pleading" rule, however, refers only to situations where the plaintiff's sole claim is a federal one disguised as a state claim; and has no application where, as here, the plaintiff's claims are grounded exclusively in state law. *See Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 366-67 (5th Cir. 1995) (further noting that the doctrine applies only in extraordinary circumstances). To be sure, Plaintiffs could have brought claims or pursued actions against parties that might have presented a proper case for removal. But they did not. The removal question is determined by reference to the claims the plaintiff *has actually* brought and by the parties that are actually – and properly – joined. *See Merrill Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986) ("jurisdiction may not be sustained on a theory that the plaintiff has not advocated").

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[5] Were it otherwise, a removing defendant could simply remove, wait for the plaintiff to explain a fatal defect, then amend the Notice of Removal to add another ground to which the plaintiff would have to reply, and so on.

Plaintiffs' claims are what they are: common law claims arising under state law. Plaintiffs elected not to sue Statoil or the other Consortium members.[6] Despite Ruhrgas' protestations, there is nothing "improper" about this. As the Fifth Circuit and the Supreme Court have stressed, a "Plaintiff is generally considered the master of his complaint, and 'whether a case arising . . . under a law of the United States is removable or not . . . is to be determined by the allegations of the complaint or petition and that if the case is not then removable it cannot be made removable by any statement in the [notice of] removal or in subsequent pleadings by the defendant.' " *Avitts v. Amoco Prod. Co.*, 53 F.3d 690, 693 (5th Cir. 1995) (vacating trial and judgment) (quoting *Great N. Ry. v. Alexander*, 246 U.S. 276, 281-82 (1918)[7]). As master of its claims, a plaintiff may avoid federal jurisdiction by exclusive reliance on state law. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987).

Ruhrgas obviously would prefer for this case to remain on the crowded docket in the federal courts for the Southern District of Texas. But in removing this action, it chose to ignore the actual claims, the actual parties and the law governing removal. Plaintiffs' claims arise *only* under state law, and the parties are *not* diverse.

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[6] Notably, Ruhrgas has not seen fit to pursue any third-party actions against these parties either.

[7] *Alexander* went on to hold that where an action is nonremovable on the complaint, it "cannot be converted into a removable one by evidence of the defendant or by order of the court upon any issue tried upon the merits." 246 U.S. at 281. The "power to determine the removablility [sic] of his case continues with the plaintiff throughout the litigation." *Id.* at 282.

This may be a source of frustration to Ruhrgas' forum preference, but the reality is that "defendant's right to remove and the plaintiff's right to choose his forum are not on equal footing." *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994); *see also Merrill Dow*, 478 U.S. at 809 n.6.

This case was not removable when it was removed, and it has not become removable since. Ruhrgas was aware of the nature of Plaintiffs' claims and presumably was well-counseled with respect to the law governing removal. Accordingly, Ruhrgas should be ordered, pursuant to 28 U.S.C. § 1447(c), to pay Plaintiffs' just costs and actual expenses, including attorneys' fees incurred as a result of its improper removal.

II. None of the Grounds for Removal are Sound

A. Plaintiffs Never Have Consented to Arbitrate Their Claims, and MPCN's Consent Cannot Be Attributed to Them

Ruhrgas devotes 19 pages of its Response to regurgitating its prior briefing on the arbitration issue, but the fact remains that none of the Plaintiffs *ever* have agreed to arbitrate their claims. There is no legal basis for forcing Plaintiffs to surrender their rights and arbitrate their claims, and this Court has already – and correctly – rejected Ruhrgas' position on this issue. *See* Memorandum and Order denying motion to stay pending arbitration, signed November 15, 1995. Regrettably, however, Ruhrgas continues its Procrustean exercise to somehow

stretch an inapplicable arbitration clause to fit this litigation; but like Procrustes' guests, Ruhrgas' arguments don't fit the case at hand.

The United States and Texas Constitutions provide explicit guarantees of access to the courts for the resolution of disputes. U.S. Const., amend. I, XIV; Tex. Const. art. 1, § 13. Any waiver of this right of access must be both clear and deliberate. *E.g., Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1512 (3d Cir. 1994), *aff'd*, 115 S. Ct. 1920 (1995) (insisting on clear evidence of consent to arbitration); *Morewitz v. West of England Ship Owners Mut. Protec. & Indem. Ass'n*, 62 F.3d 1356, 1365 (11th Cir. 1995), *cert. denied;* No. 95-883, 1995 WL 730300, 64 U.S.L.W. 3428 (U. S. Feb. 20, 1996), ("we are reluctant to mandate arbitration where the claimants clearly did not bargain to do so"). In American courts, ***"the law compels a party to submit to arbitration only if he has contracted to do so."*** *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 200 (1991) (quoting *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 374 (1974) (emphasis added).[8]

Ruhrgas itself has repeatedly stressed that there is no contractual commitment of any kind between itself and any of the Plaintiffs "concerning . . . any matters which

[8] *Accord Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1216 (1995) ("arbitration is a matter of consent, not coercion"); *Volt Info. Servs., Inc. v. Board of Trustees*, 489 U.S. 468, 478 (1989); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985); *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19-20 (1983); *Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314 (5th Cir. 1994); *Britton v. Co-op Banking Group*, 4 F.3d 742, 744 (9th Cir. 1993); *National Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326, 334 (5th Cir.), *cert. denied*, 484 U.S. 943 (1987).

are the subject of the First Amended Petition." *E.g.*, Affidavit of Wolf-Dietrich W. Hoffman at ¶ 3 (attached to Defendant's Mem. in Supp. of Mot. to Dismiss Under Fed. R. 12(b)(2), (4) and (5)); Declaration of Lutz K. Eckert at ¶ 5 (attached to Notice of Removal). Thus, unlike the parties in *J.J. Ryan*,[9] *Ripmaster*,[10] or the other authorities Ruhrgas cites, none of the Plaintiffs has ever consented to arbitration. Ruhrgas' arbitration agreement with MPCN, which itself excludes application to MPCN's affiliates, cannot substitute for Plaintiffs' consent. *E.g., Morewitz*, 62 F.3d at 1365; *Kaplan*, 19 F.3d at 1512.

1. The MPCN/Ruhrgas Contract Does Not Provide a Basis for Arbitration

The agreement between Plaintiffs' affiliate and Ruhrgas does not authorize arbitration of this case. Under long-settled U.S. law concerning contracts and corporations, that contract has no application to Plaintiffs. *E.g., Mowbray v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 795 F. 2d 1111, 1116 (1st Cir 1986); *Coltrain v. F.N. Wolf & Co.*, 818 F.Supp. 163, 163-64 (E.D. Va. 1993); *Gemco Latinoamerica, Inc. v. Seiko Time Corp.*, 671 F.Supp. 972 (S.D.N.Y. 1987) (corporate parents not bound by arbitration clause between their wholly-owned subsidiary

[9] *J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. 1988). Although Ruhrgas commenced this removal on the claim that arbitration could be compelled under U.S. authority, it has eschewed most of those cases and has now relegated the remaining authorities to page 25 of its Response.

[10] *Ripmaster v. Toyoda Gosei, Co.*, 824 F. Supp. 116 (E.D. Mich. 1993).

and plaintiff); 1 FLETCHER ENCYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 43.85 (1990 Rev. ed.); 2 FEDERAL ARBITRATION LAW § 18.4 (1995).

That certain employees of Plaintiffs MOC and MIOC were seconded to their affiliate, MPCN, to participate in the negotiations of the contract and in subsequent disputes does not suggest that either MOC or MIOC are bound by the MPCN contract. Oddly enough, in connection with its personal jurisdiction motion, Ruhrgas repeatedly argues that these employees were acting *only* on behalf of MPCN. *See* Ruhrgas' Reply to Plaintiffs' Response to Ruhrgas' Motion to Dismiss for Lack of Personal Jurisdiction at 5.[11] In connection with the remand motion, however, Ruhrgas does an about face – arguing that MOC and MIOC's involvement was so great that the French "group of companies" doctrine should be invoked. Clearly, Ruhrgas can't have it both ways – but for purposes of this motion, neither of these premature merits-related positions is determinative.

At most, the limited facts adduced so far demonstrate, as Plaintiffs have alleged, that both MOC and MIOC were justifiably concerned about their sizable investment and were aware of MPCN's contract and its

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[11] Of course, these individuals also remained MOC employees. Thus, any fraudulent omissions or misrepresentations made to them while representing MPCN necessarily were made to MPCN's lenders as well. Furthermore, they specifically kept MOC and MIOC abreast of all developments. *See* Bossley Deposition at 77:8-21 (Exhibit 2 to Ruhrgas Reply to Plaintiffs' Response to Ruhrgas' Motion to Dismiss for Lack of Personal Jurisdiction). Such merits contentions, however, have little relevance to the outstanding jurisdictional and remand issues.

terms. But awareness of an affiliate's contract, including a contract to arbitrate, is *not* a basis for compelling arbitration. *Thompson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 777 (2d Cir. 1995); *Kaplan*, 19 F.3d at 1513; *CBS, Inc. v. Snyder*, 798 F. Supp. 1019, 1025 (S.D.N.Y. 1992), *aff'd*, 989 F.2d 89 (2d Cir. 1993). Thus, for example, the Third Circuit recently held that the owners of a corporation could not be compelled to arbitrate their claims where they had signed agreements concerning the subject matter but only the corporation had signed the agreement actually containing the arbitration clause. *Kaplan*, 19 F.3d at 1513. Noting the paramount importance of consent, the court stressed that evidence of individual agreement to arbitrate must be "express" and "unequivocal." *Id.* at 1512.

Ruhrgas has not shown any evidence to suggest that Plaintiffs themselves expressly and unequivocally consented to arbitration in connection with the MPCN contract. Critically, the MPCN/Ruhrgas contract *omits* affiliates from the arbitration provision, despite defining them and referring to them elsewhere.[12] Under

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[12] This is the most obvious reason why Plaintiffs cannot be bound by the arbitration provision of the Ruhrgas/MPCN contract, yet Ruhrgas has failed to address the issue in any of its seven arbitration-related briefs. The Agreement expressly defines the term "Affiliates," but the contract's arbitration provision (Article 15) excludes *any reference* to such Affiliates being required to arbitrate disputes. Ruhrgas certainly knows how to draft a contractual provision that binds a company's affiliates. For example, its Noncompetition Agreement with Tenneco Energy Resources Corporation provides "Ruhrgas shall not, *directly or indirectly through Affiliates or otherwise*, engage in the purchase and sale of natural gas . . . other than through

universally accepted rules of contract construction, it must be presumed that this exclusion of affiliates was deliberate. *United States v. Lamere*, 980 F.2d 506, 513 (8th Cir. 1992); 17A C.J.S. *Contracts* § 312 (1963); *see also Mowbray*, 795 F.2d at 1116 (finding arbitration provision inapplicable where parties to contract were aware of third-party but excluded it from arbitration clause); *Otto Wolff Handelsgesellchaft mbH v. Sheridan Trans. Co.*, 800 F. Supp. 1353, 1357 (E.D. Va. 1992) (same); *Tays v. Covenant Life Ins. Co.*, 964 F.2d 501, 503 (5th Cir. 1992) (interpreting NASD arbitration rules); *Tropical Cruise Lines, S.A. v. Vesta Ins. Co.*, 805 F. Supp. 409, 412 (S.D. Miss. 1992) ("A court cannot twist the language contained in the contract to achieve a result which is favored by [general] federal policy [such as arbitration] but contrary to the intent of the parties). There is no basis stated in the Notice of Removal or supported by evidence that Plaintiffs assumed a contractual obligation to arbitrate anything.

2. Ruhrgas Has Not Pleaded or Proven Any Exception To The Consent Requirement Cognizable Under U.S. Law

Only in certain well-defined instances may a corporation be compelled to arbitrate because its corporate affiliate has an arbitration agreement. *See Thompson*, 64 F.3d at 778. But Ruhrgas has not pleaded, much less proven, any of these grounds in support of its conclusions. Nor has it

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TERC and its subsidiaries." Exhibit 15 to Plaintiff's Response to Motion to Dismiss for Lack of Personal Jurisdiction (emphasis added). No similar language appears in its Gas Sales Agreement with MPCN.

sought to explain how any such exception could apply where the contract it invokes deliberately excludes the position it now asserts.

Instead, Ruhrgas clings to the "virtual representation" dicta in a footnote to *In re Talbott Big Foot, Inc.*, 887 F.2d 611, 614 n.4 (5th Cir. 1989). Ruhrgas continues to disregard the actual holding in that decision, which refused to compel arbitration because the court was "unaware of any federal policy that favors arbitration for parties who have not contractually bound themselves to arbitrate their disputes." *Id.* at 614. While the Fifth Circuit has yet to revisit the footnote, *Big Foot's* actual holding has been consistently applied in the Fifth Circuit and elsewhere. *E.g., Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34, 37 (5th Cir. 1990) (citing *Big Foot* for rule that "a party cannot be compelled to submit a dispute to arbitration unless there has been a contractual agreement to do so"); *Tropical Cruise Lines*, 805 F. Supp. at 412.

Putting aside the actual holding, even the *obiter dictum* of the *Big Foot* footnote, on which Ruhrgas places exclusive reliance, does not suggest that "virtual representation" is a basis for compelling arbitration. The court clearly confined its "virtual representation" discussion to the question of whether a court might stay an unarbitrable action until a parallel arbitration was completed. Thus, the question posed in the footnote is *not* whether an arbitration commitment could be created, but rather, whether a case could be stayed for a short time pending the outcome of an existing arbitration elsewhere that might give rise to *res judicata* considerations. *See Big Foot*, 887 F.2d at 614; *Hornbeck Offshore (1984) Corp. v. Coastal Carriers Corp.*, 981 F.2d 752, 755 (5th Cir. 1993) (discussing

this aspect of *Big Foot); NCR Credit Corp. v. Reptron Elecs., Inc.*, 863 F. Supp. 1561, 1566 (M.D. Fla. 1994) (same); *Tropical Cruise Lines*, 805 F. Supp. at 413 (same). Critically, the Fifth Circuit never suggested in the footnote, as Ruhrgas would now have this Court hold, that the party to the litigation could be required to arbitrate. *See, e.g., Hornbeck*, 981 F. 2d at 755; *NCR Credit Corp.*, 863 F. Supp. at 1566.

Ruhrgas then follows with another inapposite case, *Astron Industrial Assoc., Inc. v. Chrysler Motors Corp.*, 405 F.2d 958, 961 (5th Cir. 1968), which did not involve either arbitration or removal. Nonetheless, because the court in that case found collateral estoppel to arise in connection with corporate affiliates, Ruhrgas claims that its dispute is arbitrable under the *Big Foot* footnote. Unlike this case, however, *Astron* was concerned with a scenario that could call for *res judicata* or collateral estoppel: a final judicial decision on the merits involving identical claims. *E.g., Commissioner v. Sunnen*, 333 U.S. 591 (1948) ("issues must be identical in all respects"). There is no existing litigation between MPCN and Ruhrgas – let alone one that is final or one that has resolved the same issues – that could provide such a basis here.[13] Moreover, in *Astron*, unlike

[13] Ruhrgas would have the Court extend the virtual representation doctrine to hold that Plaintiffs are "virtual" parties to the MPCN contract. There is no basis in existing law for one to be "virtually represented" in a contract. By definition, the virtual representation doctrine applies only to prior or concurrent legal proceedings. Only litigation has *res judicata* and collateral estoppel implications – contracts do not. To assert that the doctrine of virtual representation applies to contracts is erroneous, and Ruhrgas has cited no authority supporting such a proposition.

here, there was a substantiated claim of alter ego to support the identity of issues element of collateral estoppel. *E.g., Hart v. Yamaha-Parts Distrib., Inc.*, 787 F.2d 1468, 1472-73 (11th Cir. 1986) (explaining *Astron*). No such allegation has been made in this case.[14]

3. Arbitrability Is Not Governed By International Principles As Allegedly Discovered in France

Neither the Convention upon which Ruhrgas so heavily relies, nor the statute implementing it (9 U.S.C.

[14] While alter ego, unlike virtual representation, can be a valid basis for requiring a corporation to arbitrate, it has no potential application here. *Thompson*, 64 F.3d at 776. Ruhrgas has not alleged, much less proven, that Pan Ocean Energy Company, MPCN's parent, so dominates or controls its affiliate that MPCN's corporate existence should be disregarded. It has not alleged that MIOC so dominates Pan Ocean, or that MOC so dominates MIOC. Nor could it. It is far too late to add any such claim or to go off in search of evidence in support of it. *Wyant v. National R.R. Passenger Corp.*, 881 F. Supp. 919, 924-25 (S.D.N.Y. 1995); *Zaini v. Shell Oil Co.*, 853 F. Supp. 960, 964 & n.2 (S.D. Tex. 1994); *Castle v. Laurel Creek Co., Inc.*, 848 F. Supp. 62, 64-65 (S.D. W. Va. 1994). Furthermore, any such claim likely would be governed by the law of Delaware (the state of incorporation) and would be bound to fail. *Kalb, Voorhis & Co. v. American Fin. Corp.*, 8 F.3d 130, 132 (2d Cir. 1993); *Jefferson Pilot Broad Co. v. Hilary & Hogan, Inc.*, 617 F.2d 133, 135 (5th Cir. 1980); RESTATEMENT (SECOND) OF CONFLICTS § 307. Mere fact of affiliation, including 100% stock ownership, is insufficient to pierce the corporate veil. *Scott-Douglas Corp. v. Greyhound Corp.*, 304 A.2d 309, 314 (Del. Super. Ct. 1973). Rather, some fraud or serious injustice also must be shown. *Terry Apartment Assoc. v. Associated-East Mortg. Co.*, 373 A.2d 585, 588 (Del. Ch. 1977). It is not sufficient to argue, as Ruhrgas does, that it would simply be more convenient to have arbitration.

§ 205), authorizes a general abdication of U.S. law. Indeed, far from abandoning the constitutional right of access, the statute and Convention require that the arbitration agreement be committed to writing and signed. *See* Convention at art. II, 3 U.S.T. 2517.

The Convention does not suggest that its writing or signature requirements can be dispensed with in favor of the "group of companies doctrine" – a doctrine whose beginning and ends are far from self-evident. Thus, even assuming that the prevailing view among the Parisian bench and bar is that arbitration can be compelled whenever the litigant is affiliated with a corporation that has an arbitration contract, that rule has no application in this country.[15] Instead, the scope of the congressional commitment to international arbitration policies is spelled out in the Convention and its implementing statute, which track the Federal Arbitration Act. Under federal law, consent to arbitration is resolved as a matter of U.S. contract law. *First Options of Chicago v. Kaplan*, 115 S. Ct. 1920, 1925 (1995); *Morewitz*, 62 F.3d at 1364.

This Court already has ruled that the arbitration provision of Ruhrgas' Gas Sales Agreement with MPCN does not apply to Plaintiffs, a ruling consistent with controlling U.S. authority. There is no reason in law or fact for the Court to reconsider. Accordingly, the Court should

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[15] Plaintiffs don't "attempt to distinguish" *Dow Chemical v. Isover Saint Gobain*, Cour d'Appel, Paris, 21 October 1983, 110 D. S. Jur. 899 (1983) *IX Yearbook*, 132 (1984), because that decision states a rule of French law that is wholly irrelevant to this case. That case, however, does not support Ruhrgas' position, because the parties there apparently *did* agree to arbitration.

deny Ruhrgas' Motion to Reconsider, and in the process, eliminate Ruhrgas' principal basis for its removal of this case to federal court.

B. Norge Was Not Fraudulently Joined

The burden on a removing party seeking to prove fraudulent joinder is "a very heavy one,"[16] and must be established "by clear and convincing evidence."[17] All disputed questions of fact and all ambiguities in state law must be resolved in favor of the non-removing party.[18] The removing party must show actual fraud in connection with the jurisdictional averments, or that the plaintiff has "absolutely no possibility of recovery." *Green v. Amerada Hess Corp.*, 707 F.2d 201, 205 (5th Cir. 1983), *cert. denied*, 464 U.S. 1039 (1984). Ruhrgas does not allege any actual fraud; its fraudulent joinder argument is premised solely on the contention that Norge cannot possibly recover in this case.

1. Fraudulent Joinder is Not a Substitute For Summary Judgment

In its Response, Ruhrgas contends that there is insufficient evidence for Norge to prevail on claims of tortious interference and for Ruhrgas' participation in the breach

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[16] *E.g., Ford v. Elsbury*, 32 F.3d 931, 935 (5th Cir. 1995).

[17] *Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98, 100 (5th Cir) *cert. denied*, 498 U.S. 817 (1990).

[18] *Dollar v. General Motors Corp.*, 814 F. Supp. 538, 541 (E.D. Tex. 1993) (citing *Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir. 1992)).

of fiduciary duties owed to Norge by its partner, Statoil. These challenges are not only unfounded in fact, they are out of place in the fraudulent joinder context. As the Fifth Circuit has repeatedly warned, trial courts should avoid pre-trying the merits of the case in response to cries of fraudulent joinder. *E.g., Ford v. Elsbury,* 32 F.3d 931, 935 (5th Cir. 1994). While the Court may consider summary judgment-type evidence, this is *not* a summary judgment motion.[19] The only question at issue is whether there is any "possibility" that the plaintiff could recover.[20]

The alleged fraudulent joinder here is of a *plaintiff,* the merits of whose claims Ruhrgas should have attacked in state court by summary judgment. *See Louisiana v. Sprint Communications Co.,* 892 F. Supp. 145, 148 (M.D. La. 1995); *WMW Mach. Co. v. Koerber A.G.,* 879 F. Supp. 16, 17 (S.D.N.Y. 1995). In this unusual context, the only question becomes whether the plaintiff is a real party in interest. *E.g., Iowa Public Serv. Co. v. Medicine Bow Coal Co.,* 556 F.2d 400, 404 (8th Cir. 1977).

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[19] Indeed, Plaintiffs have not been permitted to take even limited discovery regarding Ruhrgas' dealings with Statoil, despite the fact that one of the claims Ruhrgas now urges the Court to dismiss concerns Ruhrgas' participation in Statoil's breach of fiduciary duty. Summary judgment practice, of course, would afford Plaintiffs such discovery.

[20] *E.g. Ford,* 32 F.3d at 938; *Green,* 707 F.2d at 205; *B, Inc. v. Miller Brewing Co.,* 663 F.2d 545, 459-50 (5th Cir. 1981); *Horton v. Scripto-Tokai Corp.,* 878 F. Supp. 902, 906 (S.D. Miss. 1995).

2. Norge is a Real Party in Interest By Virtue of Its Claim for Participation in Breach of Fiduciary Duty

That Norge is a real party in interest is readily demonstrated in connection with its claim for Ruhrgas' participation in breach of fiduciary duty. It is undisputed that Norge is a joint venturer and partner with Statoil. *See* Petition at ¶50, 17, 19. Among other things, Plaintiffs allege that Statoil breached fiduciary duties owed to Norge as a partner in the Heimdal development, that Ruhrgas knew of these breaches, and that Ruhrgas participated in those breaches. *See* Petition at ¶52-55. Ruhrgas' response is: "so what?"; explaining that it "has been unable to find any authority suggesting that Texas recognizes a cause of action for participation in a breach of fiduciary duty by another." Ruhrgas' Response at 41.

Perhaps Ruhrgas should have looked more carefully. Texas law is replete with examples of cases recognizing a cause of action for participation in breach of fiduciary duty. For instance, the Texas Supreme Court's holding on the issue is unequivocal:

> It is the settled law of this state that where a third party knowingly participates in the breach of a fiduciary, such third party becomes a joint tortfeasor with the fiduciary and is liable as such.

Kinzbach Tool Co. v. Corbett-Wallace Corp., 138 Tex. 565, 160 S.W.2d 509, 514 (1942). Numerous other cases have recognized this established rule.[21]

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[21] *See City of Fort Worth v. Pippen,* 439 S.W.2d 660, 665 (Tex. 1969) (title company held liable for knowing participation in

Under the Pass Through Agreements, Norge *remains liable* to its co-venturers for *all* obligations under the License and the Operating Agreement.[22] Likewise, nothing in those agreements relieves Norge's co-venturers (including Statoil) of their obligations to Norge. Indeed, Norge's co-venturers continued (and still continue) to recognize it as a partner long after the Pass Through Agreement's execution. *See* Amendment 3 to the Joint Operating Agreement, which is signed ~~by all~~ Heimdal partners and explicitly refers to Norge's interest in the field (contained in Exhibit 1, attached hereto). Accordingly, Norge certainly has the "possibility" of recovering against Ruhrgas for participation in Statoil's breach of

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city land agent's breach of fiduciary duty); *Kirby v. Cruce*, 688 S.W.2d 161, 166 (Tex. App. – Dallas 1985, writ ref'd n.r.e) (participants in the breach of a fiduciary's duty are jointly and severally liable, even if they do not personally receive the benefit of the breach); *Chien v. Chen*, 759 S.W.2d 484, 487 n.2 (Tex. App. – Austin 1988, no writ) (if one breaches a fiduciary duty and another knowingly participates, both may be held jointly and severally liable); *Lone Star Partners v. NationsBank Corp.*, 893 S.W.2d 593, 601 (Tex. App. – Texarkana 1994, writ denied) (same); *Herider Farms-El Paso, Inc. v. Criswell*, 519 S.W.2d 473, 477 (Tex. Civ. App. – El Paso 1975, writ ref'd n.r.e) (same).

[22] *See* Pass Through Agreements, copies of which are attached to the Declaration of Finn Engzelius as Exhibits A and B. The Declaration is attached as Exhibit 1 to the Motion to Remand. *See also* Engzelius at 112:22-113:7 (attached as Exhibit 3 to Ruhrgas' response).

fiduciary duty.[23] This fact alone proves that Norge was not fraudulently joined as a Plaintiff.

3. Norge is a Real Party in Interest Because It Holds Title to the Production License and Heimdal Gas

It is undisputed that Norge alone holds legal title to the Heimdal Production License and to the unproduced gas in the Heimdal field. Declaration of Finn Engzelius at ¶ 5 (attached as Exhibit 1 to Motion to Remand); *see also* Exhibit 1 hereto. It has alleged, and the evidence adduced so far confirms, that Ruhrgas and the Consortium are preventing MPCN from securing new purchasers for produced Heimdal gas, thereby preventing MPCN from performing its obligations to Norge under the Pass Through Agreements.[24] Norge claims that this tortious interference, along with Ruhrgas' other actions, have damaged the value of its license and the unproduced gas in the Heimdal field. Furthermore, due to Ruhrgas' actions, MPCN has terminated its existing Gas Sales Agreement with the Consortium, effective June, 1996. *See* Exhibit 2 hereto (MPCN's notification of termination). Because Ruhrgas continues to deny other buyers access to

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[23] Mr. Engzelius, Norge's Managing Director, testified that to the extent the past actions of Ruhrgas and its co-conspirators had affected the market value of North Sea gas, it would have a significant impact on the value of Norge's interest. Engzelius at 115:10-17.

[24] *See* Hoffmann Deposition at 275-79 (acknowledging Ruhrgas' refusal to permit non-Consortium members to access Heimdal gas), *i.e.* Engzelius at 116:20-117:4 (noting Ruhrgas had "blankly denied" any third party access to Heimdal gas).

MPCN's produced gas, Norge will have no buyers for its gas when MPCN ceases operations.[25] Thus, unless Ruhrgas undergoes a sudden change of heart, Norge will have additional tortious interference claims in four months. Furthermore, MPCN's demise will significantly increase Norge's exposure to liability to its partners and the Norwegian government. *See* Engzelius at 113:8; 114:1; 119-21.

Ruhrgas argues that Norge technically is the holder of a "possibility of reverter," and that under Texas law, such an interest is insufficient. Ruhrgas has completely failed, however, to consider whose law controls the nature of Norge's interest, and has misanalyzed the nature of the interest Norge conveyed to MPCN when those parties executed the Pass Through Agreement.

a. Whose Law Governs

In determining whose law governs the narrow question of ownership of the Heimdal field, this Court applies Texas choice of law rules, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), which traditionally have been

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[25] Ruhrgas argues that it is not *certain* that MPCN will be unable to locate another buyer and, thus, that there is a possibility that the default will not occur. This argument reverses the burden and would require the nonremoving party to establish its claim not by a possibility but by a certainty. *E.g., Horton v. Scripto-Tokai Corp.*, 878 F. Supp. 902, 907 (S.D. Miss. 1995). In view of the fact that Ruhrgas and the Consortium control all of the gas lines leaving Emden and have refused to provide access to non-Consortium buyers, it is not only "possible" that MPCN will not find a buyer in the next four months, it is virtually certain.

simple in this context: The title to real property is determined by the law of the situs of the property. *See Estabrook v. Wise*, 506 S.W.2d 248, 249 (Tex. Civ. App. – Tyler), *vacated as moot*, 519 S.W.2d 632 (Tex. 1974); RESTATEMENT (SECOND) OF CONFLICTS, § 223; *see also Delta Energy Resources, Inc. v. Damson Oil Corp.*, 72 B.R. 7 (W.D. La. 1985). The property at issue lies off the Norwegian continental shelf and, thus, questions about who owns it likely will be resolved under Norwegian law.

Mr. Engzelius, who also is a Norwegian attorney, testified at length about these issues, and explained that Norwegian law *requires* that a Norwegian company hold title to Norwegian oil and gas fields at all times in order to ensure that a domestic company can be called upon to respond to any obligations.[26] Engzelius at 51; Exhibit 24 to Engzelius at §§ 11 & 15 (license holder should be Norwegian registered company and license conveys exclusive right to exploration and exploitation) (attached as Exhibit 3 hereto). All North Sea Pass Through Agreements are subject to the approval of the Norwegian government in order to ensure that a Norwegian company, in this case Norge, retains title to the License for the field. *Id.*; Engzelius at 15-16; 29-31, 36-37, 42, 44. *See also* Pass Through Agreements[27] (indicating revocable governmental approval).

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[26] Ruhrgas' assertion that Norge's statutory accounts fail to reflect its interest in the Heimdal field is inaccurate. *See* Engzelius at 112:4-21.

[27] Exhibits A and B to Declaration of Finn Engzelius (Exhibit 1 to Motion to Remand).

As a matter of Norwegian law, Norge held title to the Heimdal gas before and after the Pass Through Agreement's execution, and continues to hold it today. Engzelius Deposition at 42, 44. Accordingly, Norge is a real party in interest to any action complaining of a decrease in the value of its Production License or the unproduced gas remaining in the Heimdal field.

b. The Nature of Norge's Property Interest

Even if Norge's interest were determined by Texas law,[28] Ruhrgas' argument that Norge has only a "possibility of reverter" would fail. Ruhrgas' argument relies on excerpts of Mr. Engzelius testimony in which he candidly acknowledges that the "reversion" of MPCN's beneficial interest back to Norge is not "certain" to occur at a fixed point in time. Thus, Mr. Engzelius conceded that if Ruhrgas never had interfered, he would not be able to determine when such a reversion would occur. But Ruhrgas' argument ignores the wording of the Pass Through Agreements and the facts and circumstances surrounding those agreements.

i. MPCN Received Rights Only to Produced Gas

Norge did not transfer title to its Production License or to the unproduced Heimdal gas to MPCN. Instead, it

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[28] Although Texas law will apply to Norge's tortious interference claim, it likely will not define the nature of Norge's property interest.

executed a contract permitting the gas actually gathered and produced to be sold by MPCN. Hence, as its name implies, the Pass Through Agreements allowed the income from the field to be realized by another company for taxation purpose. Engzelius at 51. The language of the Pass Through Agreement does not grant MPCN any interest in unproduced minerals in place. Far from it, the language merely grants MPCN rights in the gas that is "produced and accumulated" and makes no mention of the gas remaining in the ground. Under Texas common law, this would not convey any estate in the land (freehold or otherwise).[29]

ii. If Any Estate Passed to MPCN, It Was A Tenancy

Even assuming that the Pass Through could be construed to convey some possessory rights in the minerals in place, which it clearly does not, the next question would be whether that interest was a freehold or a non-freehold. A freehold estate is created when the grantee receives legal title in the property and is thus "seised" of the land. *E.g., Matter of Estate of Stroh*, 392 N.W.2d 192, 195 (Mich. Ct. App. 1986); Cornelius J. Moynihan, INTRODUCTION TO THE LAW OF PROPERTY 87-90, 163-167 (1962). Nothing in the Agreement suggests that MPCN received

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[29] *Canter v. Lindsey*, 575 S.W.2d 331, 335 (Tex. Civ. App. – El Paso 1978, writ ref'd n.r.e.); *Barker v. Levy*, 507 S.W.2d 613, 616-20 (Tex. Civ. App. – Houston [14th Dist.] 1974, writ ref'd n.r.e.); *see also Rhodes v. United States*, 464 F.2d 1307, 1310 (5th Cir. 1972); *Pease v. Dolezal*, 246 P.2d 757, 760 (Okla. 1952); WILLIAM E. BURBY, REAL PROPERTY § 45 (1965).

a fee to the minerals in place. Indeed, the key legal incident of "fee ownership" – the right of alienation – is completely absent. *Forderhause v. Cherokee Water Co.*, 623 S.W.2d 435, 438 (Tex. Civ. App. – Texarkana 1981), *rev'd on other grounds*, 641 S.W.2d 522 (Tex. 1982); *see also Martynes & Assoc. v. Devonshire Square Apts.*, 680 P.2d 246, 249 (Colo. Ct. App. 1984); *State Realty Co. v. Wood*, 57 S.E.2d 102, 104 (Va. 1950). Likewise, the documents on this issue confirm that Norge retained legal title to the minerals. *See* Exhibit 29 to Engzelius Deposition, attached hereto as Exhibit 4. *See also* the authorities cited *supra* at n.27; Williams & Meyers, MANUAL ON OIL AND GAS LAW, 503-04 (1987) (describing similar nonfreehold estates in the oil and gas context).

Under Texas property law, MPCN's "possession," not accompanied by "seisin," could not be a nonfreehold estate. Thus, the relationship between Norge and MPCN would be governed by the rules applicable to landlord and tenant. In particular, the estate would be for so long as the field is economically productive or until a default occurs: a periodic tenancy subject to a condition subsequent. *See Philpot v. Fields*, 633 S.W.2d 546, 548 (Tex. App. – Texarkana 1982, no writ); RESTATEMENT (SECOND) OF PROPERTY § 1.7 cmt. e (1977). Instead of a "possibility of reverter," Norge retained title throughout and also would have held a reversion of MPCN's nonfreehold estate when (1) the field became uneconomic under then-existing technological conditions or (2) MPCN came into default.

Assuming a tenancy, Norge has a clear, present right to damages

Regardless of whether reversion is triggered, Norge, under Texas notions of landlord tenant law, would have a *present* right to sue for damage to the freehold (*i.e.*, the value of the field itself) and to its reversion. *Speedman Oil Co. v. Duval County Ranch Co., Inc.*, 504 S.W.2d 923, 927 (Tex. Civ. App. – San Antonio 1973, writ ref'd n.r.e.); 51 C C.J.S. *Landlord and Tenant* § 260 (1963) ("The action of the landlord for injury to the reversion will lie notwithstanding the tenant at the same time brings an action, founded on the same cause, for injury to his possession."). Norge's claims relate to Ruhrgas' interference with MPCN's obligations to Norge under the Pass Through Agreement, Norge's inability to obtain prospective access to buyers for the Heimdal gas, as well as to the diminution in value to Norge's Production License. All of these claims are presently cognizable, notwithstanding MPCN's current contract right to sell gas that has actually been gathered.[30] *E.g.*, *Speedman Oil Co.*, 504 S.W.2d at 927.

Actual Reversion is Imminent

Regardless of Norge's present status as the fee holder under the License, it also is undisputed that MPCN is near default or termination. It has already notified the buyers, including Ruhrgas, that it will not sell gas after June of this year. *See* Exhibit 2 hereto (notification and

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[30] Mr. Engzelius testified that accessibility and likelihood of getting Heimdal gas to the market affects the value of Norge's interest. Engzelius at 92:12-23, 93:19-94:19.

consortium response). Likewise, MPCN has also notified the other participants in the Heimdal field that it considers the project to no longer be economic within the meaning of the applicable agreements. *See* Exhibit 6 hereto.

Ruhrgas, as it pointed out in its Response, disputes MPCN's right to terminate future sales. When approached repeatedly about permitting other buyers to access Heimdal gas, Ruhrgas found MPCN's requests to "lack actual relevance", noted that allowing access is not "part of its business", or has simply refused to respond. *See* Exhibit 7 hereto. There are only two possible resolutions of MPCN's current quandary. If MPCN is incorrect (and it does not have the right to terminate), then MPCN is in default within the meaning of the first paragraph of the Pass Through Agreement. In this case, Norge will terminate the Pass Through Agreement as provided in paragraph nine. If, on the other hand, MPCN is correct, then production and collection of gas will end, and with it, MPCN's rights under the Pass Through. In either event, only Norge would have the right to complain of the impact of Ruhrgas' tortious interference on the remaining gas and the Production License.

4. Norge is a Real Party In Interest Even Under Ruhrgas' Theory

Citing the RESTATEMENT (FIRST) OF PROPERTY § 214, Ruhrgas acknowledges, albeit implicitly, that the holder of a reversionary interest has standing to pursue an action against third-parties for damage to the value of the property. However, citing comment b to this section,

which refers to § 154, Ruhrgas then simply proclaims that Norge's interest is a "possibility of reverter"[31] because the date of the reversion is uncertain.[32]

Ruhrgas is correct that the date of this event is uncertain. But, as section 154 makes clear, certainty is not required. RESTATEMENT (FIRST) OF PROPERTY § 154, comment e. There, in describing an indefeasible fee sufficient to give standing to pursue an action for damages, the Restatement refers to illustration 1, an instance in which "A, having a valuable painting, transfers the painting to B for life." A has a cognizable interest notwithstanding the fact that B's life was not certain to end on a particular date.

While it was not clear at the time the Pass Through Agreement was executed that MPCN would default, it was clear that production from the field would eventually

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[31] Ruhrgas does not point to the caveat appearing at the bottom of that section, which warns: "The Institute takes no position as to whether, in situations not involving the landlord-tenant relationship, the owner of a future interest can recover damages from a third-person in cases other than those described in this section."

[32] Ruhrgas claims that Mr. Engzelius testified that a reversion might never occur. Ruhrgas Resp. at 35. This is a mischaracterization of the testimony. The questions to Mr. Engzelius focused on whether he knew for a certainty that reversion would occur as a result of MPCN's inability to find an alternate buyer before June of this year. Mr. Engzelius also explained that the lack of reversion would depend on the continued profitable operation of the field. *E.g.*, Engzelius at 87, 52. Once the field was depleted, the rights under the Pass Through would be completed and come to a natural end. *E.g.*, *id.* at 52.

decline to the point that it became uneconomic under current technological conditions to continue production. At that point, the gas well would be shut in or abandoned and the Pass Through would terminate by virtue of its own completion. Some gas would remain, however, and Norge would retain the right to any production that could be accomplished in the future once technology improves.

Ironically, even if Ruhrgas had been correct in its hypothesis that Norge's interest was a "possibility of reverter," it would have made no difference. Ruhrgas' actions have assured that MPCN will default under the Pass Through Agreement because it no longer will be able to sell its gas to anyone after June, 1996. Accordingly, Ruhrgas has rendered termination of the Pass Through Agreement a necessity, making the "possibility" of reverter a "certainty." Besides, even a "possibility" of reverter indicates there is a "possibility" of recovery, which is all that is required to defeat a fraudulent joinder assertion.

C. The Claims Asserted in the Petition Do Not Arise Under Federal Law

Finally, Ruhrgas claims that federal question jurisdiction also exists because the Plaintiffs' claims involve international issues. In support of this, Ruhrgas originally invoked the Act of State doctrine. *See* Notice of Removal at ¶ 7. In apparent recognition of the failings of this theory,[33] Ruhrgas now claims that the Note Verbale and

[33] In the first place, no party to this action is a foreign sovereign. In addition, the Act of State doctrine is simply *not* applicable to "acts committed by foreign sovereigns in the course of their purely commercial activities." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 683, 706 (1976); *Arango, v. Guzman Travel Agency Travel Advisors Corp.*, 621 F.2d 1371, 1380-81 (5th Cir. 1980); *Behring Int'l, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. 396 (D.N.J. 1979). Thus, even assuming that Statoil were made a party and that it sought to invoke this defense, it would likely have a difficult task in explaining how the marketing of gas to foreign markets is anything but a commercial activity. Moreover, the act-of-state analysis presupposes that the case already is properly in federal court. But, of course, that is not the case here.

the amicus brief of the Federal Republic of Germany filed on its behalf have imbued the Plaintiffs' claims with an international aura.[34] *See* Ruhrgas Response at 43-50. This, claims Ruhrgas, is sufficient to convert claims of common law tort into "federal questions" under 28 U.S.C. § 1331.

This argument ignores the analysis required for federal question removal jurisdiction. First, the issue is whether Plaintiffs' claims arise under federal or state law. That Ruhrgas has managed to wield sufficient influence within the German government to obtain arguments on essentially every pending issue does not change the character of Plaintiffs' claims. Statements by the defendant in its removal or subsequent pleadings do not create a

[34] The mere fact that Ruhrgas has managed to secure a brief and Note Verbale stating that Ruhrgas, rather than the Plaintiffs, should win all of the outstanding motions and purporting to substantiate the national interest in favor of Ruhrgas' positions merely attests to Ruhrgas' substantial influence within the German government. During discovery, Ruhrgas admitted that its representatives had met with the German government to discuss the case. *See* Benke Deposition at 79-80 (Exhibit 12 to Plaintiffs' Response to Ruhrgas' Motion to Dismiss for Lack of Personal Jurisdiction).

ground for removal under federal law. *See Avitts*, 53 F.3d at 693. The statements of essentially an "oath helper," even a sovereign one, are of no assistance to the Court's analysis.

This Court and the Fifth Circuit both have held that claimed assertions of international issues are "foreclosed by the familiar well-pleaded complaint rule." *Aquafaith Shipping, Ltd. v. Jarillas*, 963 F.2d 806, 808 (5th Cir.), *cert. denied*, 506 U.S. 955 (1992); *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1348-49 (S.D. Tex. 1995). Here, the Petition states no such issues.

Second, even assuming the presence of an "international issue", it would not convert Plaintiffs' claims into federal questions arising under federal common law. The federal common law is severely restricted and does not reach to every case involving national or foreign interests, as Ruhrgas' argument implies. The recognition of federal law is normally left to Congress and always results in the displacement of state law. Accordingly, as the Supreme Court has warned, "the instances where we have created federal common law are few and rare." *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963). The Fifth Circuit has been no more receptive. The court, sitting *en banc*, has refused to usurp state law unless the asserted "interest . . . relate[s] to an articulated congressional policy or directly implicate[s] the authority and duties of the United States as a sovereign." *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1325 (5th Cir. 1985) *(en banc)*. None of Plaintiffs' claims in this case arise out of an articulated congressional policy, nor do they implicate the authority of the United States as a sovereign. Instead, they merely state garden-variety fraud and tort claims.

Third, even if the "intervention" of the German government had some relevance, the claims in this case do not have any colorable impact on Germany and thus cannot implicate laws of foreign relations or thereby create an international issue. Only where dispositive issues in the case would *require* application of federal common law will the federal question statute be invoked. *First Haw. Bank v. Alexander*, 558 F. Supp. 1128, 1131 (D. Haw. 1983). The claims here arise in tort. None of the Plaintiffs seek injunctive relief or any form of order that would interfere with the title to property in a foreign state.[35] The only conceivable impact this case would have on a foreign nation would be to require one of its citizens to pay a judgment. If this were enough to create a federal question, every action involving a foreign defendant would be removable, and state courts would have no authority over any such claim.

The German filings themselves demonstrate that this case does not involve questions of foreign relations. Far from confirming that Plaintiffs' claims arise under federal law or that the claims would affect some sovereign interest of Germany, the filings merely repeat all of Ruhrgas'

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[35] Furthermore, given the infinitesimal impact of Heimdal gas on Germany's total gas purchases, this case could not possibly have any impact on the price of gas in Germany as the German government implies. Dr. Hoffmann, the head of Ruhrgas' North Sea gas purchases, testified that such gas only accounts for 0.5% of Ruhrgas' gas purchases. Hoffmann Deposition at 69-70 (Exhibit I to Plaintiffs' Response to Ruhrgas' Motion to Dismiss for Lack of Personal Jurisdiction). In any event, Plaintiffs are not seeking any adjustment to the purchase price for gas in the North Sea as a remedy for the claims asserted in this case.

arguments. The timing of the German filings suggests they were prepared at Ruhrgas' insistence so that it now could cry "international issue."[36]

None of the cases Ruhrgas cites support its claim that this case presents "international issues." In *Kern v. Jeppesen Sanderson, Inc.*, 867 F.Supp. 525 (S.D. Tex. 1994), the plaintiffs well-pleaded complaint arose under a federal treaty, thereby clearly creating a federal question. In *Sequihua v. Texaco, Inc.*, 847 F.Supp. 61, 62-63 (S.D. Tex. 1994), the plaintiffs were residents of a foreign country and sought a decree which would have required a transfer of title to real property located in a foreign nation. In short, there was no state interest in the claim and, instead, the claim directly affected the United States' foreign relations. In *Grynberg Prod. Corp. v. British Gas, p.l.c.*, 817 F. Supp. 1338 (E.D. Tex. 1993), a Colorado oil and gas firm brought suit against a British gas company seeking injunctive relief to settle ownership and production rights to an oil field in Kazakhstan. In contrast, Plaintiffs here (two of whom are Texas residents and one of whom is a Norwegian corporation with a Houston office) seek money damages under Texas tort law for actions performed at least in part in Texas.

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[36] The German government filed its Note Verbale with the State Department on December 15, 1995. Neither Ruhrgas nor Germany advised this Court of such a filing until mid-January, 1996. By that time, briefing on Ruhrgas' motion to reconsider this Court's arbitration decision had been completed; and it was clear that Ruhrgas' various jurisdictional claims had little support in fact or law. The German filings simply reflect a belated attempt to concoct a jurisdictional barrier.

CONCLUSION

Ruhrgas has not met its heavy burden of proving this case was removable at the time it was filed. Instead, the briefing and evidence clearly show that Ruhrgas filed its Notice of Removal despite the fact that Plaintiffs' Petition raised only state law claims and one of the Plaintiffs was an alien. The cornerstone of Ruhrgas' removal, its arbitration clause with MPCN, does not even apply to Plaintiffs, which is obvious from a reading of the contract itself. There was no legal or factual basis for removal to federal court, and Ruhrgas' discovery calculated to find such a basis failed to do so. This case should be remanded to Texas state court, and Plaintiffs should be awarded their just costs and attorneys' fees for having to engage in this lengthy and expensive waste of the Court's and the parties' time and resources.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this document was served on Defendant's attorneys of record in accordance with Federal Rule of Civil Procedure 5, on February 22, 1996.

/s/ David Schenck

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, and MARATHON PETROLEUM NORGE A/S,	§	CIVIL ACTION NO. H-95-4176
Plaintiffs,	§	
VS.	§	
RUHRGAS, A.G.,	§	
Defendant.	§	

RUHRGAS AG'S SURREPLY TO PLAINTIFFS' REPLY BRIEF ON THEIR MOTION TO REMAND

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Ruhrgas AG, subject to and without waiver of its previously filed motions, including but not limited to its Motion to Dismiss for lack of personal jurisdiction, files this Surreply to Plaintiffs' Reply Brief on Their Motion to Remand.

I.

PLAINTIFFS ARE BOUND TO ARBITRATE THEIR CLAIMS UNDER THE CONVENTION

In the portion of Ruhrgas AG's Response to Plaintiffs' Motion to Remand (Instr. No. 64) addressing subject matter jurisdiction under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,

Ruhrgas AG has focused primarily on the matters which have been addressed to the Court in connection with its Motion for Reconsideration of the Court's November 15, 1995 Order denying Ruhrgas AG's Motion for Stay Pending Arbitration. Specifically, Ruhrgas AG has focused on:

- The arbitrability of Plaintiffs' claims under the "group of companies" doctrine recognized in international arbitration; and
- The evidence which now demonstrates that, contrary to the Court's conclusions in its November 15 Order, Plaintiffs' claims are based on alleged conduct "in relation to MPCN" and are not "independent" of any claims of MPCN.

Plaintiffs' Reply Brief (Instr. No. 67) touches only briefly on the first of these focal points, and is virtually silent on the second.

With respect to the "group of companies" doctrine, Plaintiffs argue that the Court is bound to apply domestic U.S. legal principles in determining whether Plaintiffs are bound to arbitrate their claims. This approach is directly inconsistent with the directives of the U.S. Supreme Court in ***Scherk v. Alberto-Culver Co.***, 417 U.S. 506, 94 S. Ct. 2449 (1974) and ***Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.***, 473 U.S. 630, 105 S. Ct. 3346 (1985), discussed in Ruhrgas AG's Response to Motion to Remand (Instr. No. 64) at 19-20. The Supreme Court in ***Scherk*** stated that such an approach would "unnecessarily exalt the primacy of United States law over the laws of other countries." 94 S. Ct. at 2456 n.11.

Plaintiffs also argue that the "group of companies" doctrine cannot apply here because "the terms of the

arbitration agreement itself unambiguously *exclude* any application to Plaintiffs." Reply Brief (Instr. No. 67) at 2. In support of this argument, Plaintiffs urge that the Heimdal Gas Sales Agreement "*omits* affiliates from the arbitration provision, despite defining and referring to them elsewhere." ***Id.*** at 11. None of Plaintiffs' assertions are valid.

While the Heimdal Gas Sales Agreement does refer to "affiliates," none of the references address rights or obligations of affiliated companies. The issue whether affiliates are bound to arbitrate claims which arise out of the Heimdal Gas Sales Agreement is *not* expressly addressed in the arbitration agreement. It was not necessary for the parties to expressly incorporate provisions addressing every possible scenario in which an affiliate would be obligated to arbitrate; the parties were entitled to leave those issues to the applicable rules and law governing the agreement. ***See Luling Oil & Gas Co. v. Humble Oil & Refining Co.***, 191 S.W. 2d 716, 724 (Tex. 1945) ("When an agreement is silent or obscure as to a particular subject, the law and usage become a portion of it and constitute a supplement to it and interpret it."); ***accord Norfolk and Western Railway Co. v. American Train Dispatchers' Association***, 499 U.S. 117, 111 S. Ct. 1156, 1164 (1991). In that regard, the parties expressly incorporated by reference the Rules of Conciliation and Arbitration of the International Chamber of Commerce ("ICC Rules"), thereby incorporating the international arbitration principles which have been applied under those rules, including the "group of companies" doctrine applied in ***Dow Chemical v. Isover Saint Gobain,*** Cour d' Appel, Paris, 21

October 1983, 110 J. 899 (1983) IX Yearbook 132 (1984).[1] In *Dow*, the agreement in question specifically referenced Dow Chemical (France), a non-signatory, and expressly provided that Dow Chemical (France) was designated as a company which would deliver products pursuant to the agreement. Notwithstanding these references to Dow Chemical (France) in the agreement, notwithstanding the absence of any provision expressly obligating Dow Chemical (France) to arbitrate, and notwithstanding the absence of a signature by Dow Chemical (France) on the agreements, it was held that Dow Chemical (France) was bound by the arbitration agreement. The panel based its conclusion in large part on the agreement's incorporation of the ICC Rules, and the prior decisions thereunder applying the "group of companies" doctrine. *Id.* at 136.

Applying the *Dow* rationale, not only does the arbitration clause in the Heimdal Gas Sales Agreement not *exclude* application of the "group of companies" doctrine, the parties' incorporation of the ICC Rules demonstrates that an affiliated company which controlled the negotiation, execution, or performance of the agreement *would* be bound thereby.[2] As shown in Ruhrgas AG's Response to

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[1] A copy of the English translation of the *Dow* decision is attached as Exhibit 21 to Ruhrgas AG's Response to Motion to Remand (Instr. No. 64).

[2] Plaintiffs assert in the Reply Brief (Instr. No. 67) at 11 n.12 that Ruhrgas AG never addressed this issue in any of its seven arbitration-related briefs. Wrong. Ruhrgas AG made the identical argument in response to the same contention in its Reply to Plaintiffs' Response to Ruhrgas AG's Motion to Reconsider (Instr. No. 47) at 8-9.

Motion to Remand (Instr. No. 64) at 15-19 such control is present here.[3]

The second focal point of Ruhrgas AG's Response to Motion to Remand with respect to the arbitration issues is the question whether Plaintiffs' claims are based on conduct "in relation to MPCN" and are "independent" of claims of MPCN. In denying Ruhrgas AG's Motion for Stay Pending Arbitration, this Court relied heavily on its conclusions that Plaintiffs' claims were not based on conduct "in relation to MPCN" and that Plaintiffs' claims were "independent" of any claims of MPCN. Memorandum and Order (Instr. No. 38) at 7, 8-9. In its Motion for Reconsideration (Instr. No. 39) of that Order and its other filings in support thereof (Instr. Nos. 47 and 59), and in its Response to Motion to Remand (Instr. No. 64), Ruhrgas AG presented deposition testimony and documentary evidence demonstrating that Plaintiffs' claims

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[3] Plaintiffs argue in their Reply Brief (Instr. No. 67) at 10 that Ruhrgas AG's control arguments are inconsistent with the argument contained in Ruhrgas AG's Reply to Plaintiffs' Response to Motion to Dismiss for Lack of Personal Jurisdiction that the Marathon personnel dealing with Ruhrgas AG were doing so on behalf of MPCN. There is no inconsistency. It is undisputed that the Marathon personnel dealing with Ruhrgas AG were doing so on behalf of MPCN. Evans Depo. (Ex. 1 to Ruhrgas AG's Response to Motion to Remand) at 23-25, 30; Bossley Depo. (Ex. 2 to Ruhrgas AG's Response to Motion to Remand) at 40-46, 53-54, 59-60, 62-64, 77-78. But it is also undisputed that MOC and MIOC controlled the activities of the Marathon personnel acting on behalf of MPCN. *See* Ruhrgas AG's Response to Motion to Remand (Instr. No. 64) at 15-19 and Exhibits 22-55 thereto.

are based on conduct "in relation to MPCN" and are *not* "independent" of any claims of MPCN.

Plaintiffs' Reply Brief (Instr. No. 67) is virtually silent on these issues. Plaintiffs only assert in footnote 11 that "any fraudulent omissions or misrepresentations made to [MOC employees] while representing MPCN necessarily were made to MPCN's lenders as well." Reply Brief (Instr. No. 67) at 10 n.11. This assertion supports, rather than refutes, Ruhrgas AG's contention that Plaintiffs' claims are based on conduct "in relation to MPCN" and are not "independent" of any claims of MPCN. Plaintiffs' assertion acknowledges that the alleged fraudulent conduct of Ruhrgas AG was directed at Marathon personnel "while representing MPCN." Apparently, Plaintiffs are claiming that these representatives were also cognizant of the interests of Marathon Oil Company and Marathon International Oil Company, and also relied on Ruhrgas AG's alleged fraudulent representations and omissions made to MPCN in later acting on behalf of those companies. Nevertheless, alleged fraudulent conduct, allegedly directed at Marathon personnel "while representing MPCN," can be characterized only as conduct "in relation to MPCN," and any claims arising from allegedly fraudulent misrepresentations and omissions made to Marathon personnel "while representing MPCN" cannot be properly characterized as claims which are "independent" of those of MPCN.[4]

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[4] Two additional points raised by Plaintiffs' Reply Brief deserve brief response. First, Plaintiffs, citing ***Hornbeck Offshore (1984) Corp. v. Coastal Carriers Corp.***, 981 F.2d 752 (5th Cir. 1993) and ***NCR Credit Corp. v. Reptron Elecs., Inc.***, 863 F. Supp. 1561 (M.D. Fla. 1994), argue that the Fifth Circuit was not suggesting in footnote 4 to its opinion in ***In re Talbott Big Foot, Inc.***, 887 F.2d 611 (5th Cir. 1989) that a party in privity with a signatory to an arbitration agreement may be required to arbitrate. Contrary to Plaintiffs' arguments, ***Hornbeck*** did not address the issue, and ***NCR Credit*** supports Ruhrgas AG's position. In ***NCR Credit,*** NCR argued that because it did not sign the arbitration agreement between the defendant and NCR's parent company, its action could not be stayed pending arbitration under 9 U.S.C. § 3, citing ***In re Talbott Big Foot, Inc.***. The court rejected that interpretation of the opinion, noting that the Fifth Circuit had gone on to suggest that a party in privity with a signatory might be subject to such a stay. 863 F. Supp. at 1566. That interpretation of the footnote is consistent with Ruhrgas AG's position.

Second, Plaintiffs argue that ***Astron Industrial Assoc., Inc. v. Chrysler Motors Corp.***, 405 F.2d 958 (5th Cir. 1968) is distinguishable because "there was a substantiated claim of alter ego. . . ." Reply Brief (Instr. No. 67) at 14. The words "alter ego," however, do not appear in the opinion in ***Astron***, and no "alter ego" analysis was undertaken in that case.

Plaintiffs are bound to arbitrate their claims under the Convention. As such, this Court has jurisdiction of this case pursuant to 9 U.S.C. §§ 203 and 205, and the Motion to Remand should be denied.

II.

NORGE IS NOT A REAL PARTY IN INTEREST AND WAS FRAUDULENTLY JOINED

In their Reply Brief in Support of their Motion to Remand (Instr. No. 67), Plaintiffs continue to assert that Marathon Petroleum Norge A/S ("Norge") holds rights under the Operating Agreement for the Heimdal Field and the Production License for the Heimdal Field,

allegedly supporting claims for (1) alleged participation by Ruhrgas AG in a breach of fiduciary duty by Statoil and (2) tortious interference. In making these arguments, Plaintiffs (1) attempt to rewrite the terms of the Pass Through Agreements by which Norge disposed of its rights in the Heimdal Field, (2) ignore and mischaracterize the testimony of Norge's own chief executive officer, Mr. Finn Engzelius, and (3) attempt to change the nature of Norge's purported claims and their arguments in support thereof, all in a desperate attempt to avoid the jurisdiction of this Court. For the reasons set out in Ruhrgas AG's Response to Plaintiffs' Motion to Remand, and below, Norge is not a real party-in-interest and was fraudulently joined for the purpose of defeating removal jurisdiction.

A. Norge's Purported Assertion of Rights Under the Operating Agreement

The Pass Through Agreements executed by Norge in the 1970s expressly provide that MPCN "shall assume all the rights, benefits, obligations and duties" of Norge under the Operating Agreement. Pass Through Agreements ¶ 3.[5] Mr. Engzelius, chief executive officer of Norge, acknowledged that by virtue of the Pass Through Agreements, Norge's rights under the Operating Agreement are "suspended." Engzelius Depo. at 76.[6] Specifically, Mr. Engzelius testified:

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[5] Copies of the Pass Through Agreements are attached as Exhibits 61 and 62 to Ruhrgas AG's Response to Plaintiffs' Motion to Remand (Instr. No. 64).

[6] The complete transcript of Mr. Engzelius' deposition is attached as Exhibit 3 to Ruhrgas AG's Response to Plaintiffs' Motion to Remand (Instr. No. 64).

> Q: . . . would you agree that based on your understanding, any rights of Marathon Petroleum Norge A/S under the Operating Agreement as amended are currently suspended by virtue of the Pass Through Agreements?
>
> A: True.

Id. Furthermore, the July 1980 amendment to the Operating Agreement expressly acknowledges that under the Pass Through Agreements, MPCN "receives all the rights and benefits attributable to [Norge's] interest under the [Operating] Agreement."[7] This conclusion is consistent with the papers filed by MPCN in the court proceedings it has initiated in Stavanger, Norway against Statoil and the other owners of Statpipe, wherein it alleges that *MPCN is the joint venturer.* Stavanger Complaint (Ex. 5 to Ruhrgas AG's Response to Motion to Remand) ¶ 1.3. Although Plaintiffs assert in their Reply Brief (Instr. No. 67) at 4, that the Stavanger proceeding "is entirely distinct from the parties and claims in this case," this assertion is not true.

In both the Stavanger Complaint and in the First Amended Petition filed in this case, the following contentions are made: (1) Statoil and the Consortium agreed to lower North Sea gas prices in return for an agreement to commit the Troll gas to Ruhrgas at a reduced price (First Amended Petition ¶ 23; Stavanger Complaint ¶ 4.2); (2) when MPCN refused to lower the price for Heimdal gas,

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[7] The July 1980 amendment to the Operating Agreement is attached as Exhibit 59 to Ruhrgas AG's Response to Plaintiffs' Motion to Remand (Instr. No. 64).

the Consortium unilaterally lowered their payments (First Amended Petition ¶ 24; Stavanger Complaint ¶ 4.3); (3) Statoil assured MPCN that the transportation tariffs would decrease because of increased volumes of gas from the Troll Field, making MPCN's operations more economical (First Amended Petition ¶ 30; Stavanger Complaint ¶ 4.6); (4) contrary to its alleged assurances, Statoil did not send its Troll gas through the Statpipe Pipeline and Statoil's tariff reduction projections have not been fulfilled (First Amended Petition ¶¶ 31, 32; Stavanger Complaint ¶¶ 4.7, 4.8); (5) as a result, MPCN is experiencing a substantial negative cash flow (First Amended Petition ¶ 33; Stavanger Complaint ¶ 4.8). Both actions seek recovery of money for losses sustained.[8] Norge is not a party to the Stavanger proceedings, and has made no claims, demands, or allegations against Statoil. Engzelius Depo. at 99-100. In short, MPCN is the holder of the rights under the Operating Agreement, not Norge.

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[8] With respect to MPCN's European Commission proceeding, Plaintiffs argue that "no such action has been filed," noting that the document is "merely a draft complaint" Reply Brief (Instr. No. 67) at 4. However, MPCN's letter to Ruhrgas AG dated July 21, 1995, attached at tab 3 to Exhibit B to Ruhrgas AG's Notice of Removal (Instr. No. 1), states that MPCN "has served [Statoil] with a complaint to the European Commission." In any event, whether it has been filed or not, MPCN has made the allegations set out in the "draft complaint" (Exhibit 6 to Ruhrgas AG's Response to Motion to Remand) which include many of the same allegations discussed above with respect to the Stavanger Complaint and the First Amended Petition filed herein. ***See, e.g.***, European Commission Complaint ¶¶ 23, 24, 37, 45, 54, 69, 70.

Although these points were made by Ruhrgas AG in its Response to the Motion to Remand (Instr. No. 64) at 41-42, Plaintiffs' Reply Brief ignores them. Instead, Plaintiffs argue that Norge has claims under the Operating Agreement by virtue of the fact that it "remains liable" to the other venturers for obligations under the Operating Agreement. Reply Brief at 18. Prospective *liability* under the Operating Agreement in the event MPCN fails to perform under the Pass Through Agreements does not create *rights* under the Operating Agreement. Under the Pass Through Agreements, MPCN is the current holder of any rights under the Operating Agreement, and MPCN therefore is the real party-in-interest with respect to any claim for breach of obligations arising out of the Operating Agreement.[9]

In summary, Norge does not hold the substantive rights under the Operating Agreement which are sought to be enforced. As such, Norge is not a real party-in-interest with respect to the breach of fiduciary duty claim, and has no possibility of recovery thereon. ***Farrell***

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[9] In any event, the causes of action asserted by Norge do not and cannot arise out of any purported liability of Norge to the venturers under the Operating Agreement. As noted above, MPCN assumed responsibility for performing Norge's obligations under both the Operating Agreement and Production License in the Pass Through Agreements. Mr. Engzelius testified that MPCN has performed the obligations which it assumed under the Pass Through Agreements and is not in default of those obligations. Engzelius Depo. at 78-79. Mr. Engzelius acknowledged that Norge has not been required to perform any obligations in connection with the Heimdal Field subsequent to the execution of the Pass Through Agreements. ***Id.*** at 109-10.

Constr. Co. v. Jefferson Parish, 896 F.2d 136, 140 (5th Cir. 1990).

B. Norge's purported Rights Under the Production License

Plaintiffs also assert that Norge is seeking to enforce rights which it purportedly holds under the Heimdal Field Production License. Specifically, Plaintiffs argue that Norge has a viable tortious interference claim which implicates such rights.

The First Amended Petition alleges a cause of action for tortious interference with *MPCN's* (not Norge's) prospective business relations:

> Marathon's affiliate [MPCN] had (and has) a reasonable probability of entering into business relationships with other gas buyers. Ruhrgas AG maliciously and intentionally prevented (and still is preventing) those relationships from occurring.

First Amended Petition ¶ 46. As shown in Ruhrgas AG's Response to Plaintiffs' Motion to Remand (Instr. No. 64) at 37-38, a corporation cannot pursue a claim for tortious interference with the business relations of its affiliate. *Diesel Systems, Limited v. Yip Shing Diesel Engineering Co., Limited,* 861 F. Supp. 179, 181 (E.D.N.Y. 1994); *Osborn v. Bell Helicopter Textron, Inc.,* 828 F. Supp. 446, 450-51 (N.D. Tex. 1993). In their Reply Brief, Plaintiffs do not challenge this proposition. In short, Norge is not the real party-in-interest with respect to, and has no possibility of recovery on the claim for tortious interference with the prospective

business relations of MPCN, which is the only tortious interference claim asserted in the First Amended Petition.

The lack of pleadings alleging any other tortious interference claim has not stopped Plaintiffs from attempting to expand the scope of Norge's purported tortious interference claims. In their Brief in Support of their Motion to Remand, Plaintiffs asserted that remand is proper based on a claim that Ruhrgas AG had interfered "with Norge's ability to realize the value of its license." Plaintiffs' Brief in Support of their Motion to Remand (Instr. No. 13) at 5. The short answer to Plaintiffs' assertion is that "claims which have not been pled cannot form the basis of an Order of Remand." ***Sharp v. CNA Lloyds,*** No. H-92-2308, 1992 U.S. Dist. LEXIS 21143, *11 (S.D. Tex. Dec. 22, 1992) (Exhibit A hereto). Because the First Amended Petition does not assert a claim for tortious interference "with Norge's ability to realize the value of its license," such a claim cannot defeat the removal of this case.

In any event, as shown in Ruhrgas AG's Response to Plaintiff's Motion to Remand (Instr. No. 64) at 38-39, Norge has no viable claim for interference with its own prospective business relations. Mr. Engzelius admitted that (1) Norge has engaged in no negotiations to market or sell gas from the Heimdal Field, (2) Norge does not have the right to do so, and (3) Norge has not engaged in any negotiations to convey any reversionary interest it may hold. Engzelius Depo. at 60, 91, 98. In short, it is undisputed that Norge is not attempting to enter into any prospective business relations. In their Reply Brief, Plaintiffs make no effort to challenge these arguments. To the contrary, Plaintiffs acknowledge that Norge can have no

claim for tortious interference with respect to any prospective sale of Heimdal gas until June 1996 at the earliest. Specifically, Plaintiffs state:

> Because Ruhrgas AG continues to deny other buyers access to MPCN's produced gas, Norge will have no buyers for its gas when MPCN ceases operations. Thus, *unless Ruhrgas AG undergoes a sudden change of heart, Norge will have additional tortious interference claims in four months.*

Plaintiffs' Reply Brief at 19 (emphasis added). This statement is an acknowledgment by Plaintiffs that Norge does not yet have any right to assert a claim for tortious interference with respect to prospective gas sales. Even if such a claim was set out in the First Amended Petition (and it is not), it would not support a remand.

Having implicitly acknowledged that Norge has no claims for tortious interference with prospective business relations of either MPCN or Norge, Plaintiffs, in their Reply Brief filed on February 22, 1996, assert for the very first time that Norge has a claim for tortious interference with Norge's *existing* contractual relations with MPCN. Plaintiffs' Reply Brief (Instr. No. 67) at 18-19, 23. Specifically, Plaintiffs now assert:

> Ruhrgas AG and the Consortium are preventing MPCN from securing new purchasers for produced Heimdal gas, thereby preventing MPCN from performing its obligations to Norge under the Pass Through Agreements.

Plaintiffs' Reply Brief (Instr. No. 67) at 18. Quite simply, a claim that Ruhrgas AG tortiously interfered with the Pass Through Agreements is not in this case. In the section of

Plaintiffs' First Amended Petition setting out Plaintiffs "Causes of Action," the following heading precedes the tortious, interference allegations:

TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS

First Amended Petition at 14. The First Amended Petition asserts only claims for interference with *prospective business* relations, not *existing contractual* relations. As noted above, "claims which have not been pled cannot form the basis of an Order of Remand." ***Sharp,*** 1992 U.S. Dist. LEXIS 21143, *11 (Exhibit A). Nevertheless, even if such a claim were set forth in the First Amended Petition (and it is not), Norge has no present right to assert any such claim, as shown below.

At the heart of Norge's latest tortious interference allegation is its contention that Ruhrgas AG prevented MPCN from performing its obligations to Norge under the Pass Through Agreements.[10] Yet, it is undisputed that MPCN has not been prevented from performing its obligations to Norge under the Pass Through Agreements. Mr. Engzelius testified that MPCN has performed the obligations which it assumed under the Pass Through Agreements and is not in default of those obligations.

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[10] In their Reply Brief (Instrument No. 67) at 18 and n.24, Plaintiffs urge that Mr. Hoffmann of Ruhrgas AG acknowledged in his deposition that Ruhrgas AG has prevented MPCN from securing new purchasers for Heimdal gas. Plaintiffs mischaracterize his testimony. Mr. Hoffmann testified only that it is the Consortium's position that the agreement was not effectively terminated and that MPCN is obligated to sell the gas to the Consortium. Hoffmann Depo. at 275-279.

Engzelius Depo. at 78-79. Mr. Engzelius acknowledged that Norge has not been required to perform any obligations in connection with the Heimdal Field subsequent to the execution of the Pass Through Agreements. ***Id.*** at 109-10. Plaintiffs' latest desperate attempt to concoct a viable tortious interference claim in favor of Norge, like its other efforts, is defeated by the deposition of testimony of Norge's own chief executive officer.

In any event, Norge cannot assert *any* cause of action (for tortious interference or otherwise) arising out of rights under the Production License, because Norge does not hold those rights. The Production License provides that it grants "an exclusive right to explore for and produce petroleum in the area mentioned" therein.[11] In the Pass Through Agreements, Norge assigned the rights under the Production License to MPCN:

> [MPCN] shall own and receive without additional compensation *all the rights* of [Norge] to all the petroleum which may be produced and accumulated under the Production License,. . . . and [MPCN] shall assume *all the rights*, benefits, obligations and duties of [Norge] under said License. . . .

Pass Through Agreements ¶ 3 (emphasis added). Mr. Engzelius admitted in his deposition that by virtue of the Pass Through Agreements, Norge has not held and does not hold the right to explore for, produce, or sell gas from

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[11] A copy of the Production License is attached as Exhibit 56 to Ruhrgas AG's Response to Plaintiffs' Motion to Remand (Instr. No. 64).

the Heimdal Field. Engzelius Depo. at 59-60. The substantive rights sought to be enforced in this case are the rights to explore for, produce, and market gas from the Heimdal Field. As Norge does not hold those substantive rights, Norge is not a real party-in-interest, and has no possibility of recovery. ***Farrell Const. Co. v. Jefferson Parish,*** 896 F.2d at 140.

In their Reply Brief, Plaintiffs argue that the fact that Norge holds no rights to explore for, produce, or sell Heimdal Field gas is irrelevant to the remand issues because Norge allegedly holds legal title to the Heimdal gas under Norwegian law. It is unnecessary to address this issue, however, because, as noted by Ruhrgas AG in its Response to Plaintiffs' Motion to Remand (Instr. No. 64) at 32, the holder of mere legal title is not a real party-in-interest. *Stonybrook Tenants Association, Inc. v. Alpert,* 194 F. Supp. 552, 556 (N.D. Conn. 1961). Plaintiffs do not challenge this proposition in their Reply Brief. Even if it is assumed for purposes of argument that Plaintiffs' characterization of Norwegian law is correct, Norge's purported legal title under the Production License would not render Norge a real party-in-interest, inasmuch as Norge indisputably has conveyed to MPCN the beneficial rights under the Production License, *i.e.*, the right to explore for, produce, and sell the gas.

Plaintiffs also argue that Norge holds justiciable rights under the License because, according to Plaintiffs, it is certain that the rights currently held by MPCN will revert to Norge. Reply Brief at 25. Specifically, Plaintiffs argue that the rights under the License will definitely revert to Norge when the Heimdal Field becomes "uneconomic under then-existing technological conditions," or

when MPCN goes into default under the Pass Through Agreements. Plaintiffs' Reply Brief (Instr. No. 67) at 23. Plaintiffs' arguments are conclusively refuted by the unambiguous language of the Pass Through Agreements, by MPCN correspondence, and by the testimony of Norge's own chief executive officer, Mr. Engzelius.

First, there is nothing in the Pass Through Agreements that remotely suggests that they will terminate when the Heimdal Field becomes uneconomic. The only provision in the Pass Through Agreements concerning termination of the Pass Through Agreements or the possibility of reversion of rights to Norge is paragraph 9 of the Pass Through Agreements, which states:

> If [MPCN] defaults on any provision of this Agreement, [Norge] shall have the right to terminate the Agreement with immediate effect.

Pass Through Agreements ¶ 9. Plaintiffs suggestion that the Agreement would terminate or that rights would revert to Norge when the field becomes uneconomic, even if there is no default by MPCN, is nothing but a creation of Plaintiffs; there is nothing in the Pass Through Agreements to support it. To the contrary, it is inconsistent with Mr. Engzelius' testimony that the intent of the Pass Through Agreements was for MPCN to produce and sell *all* of the gas in the field, with Norge selling *none*. Engzelius Depo. at 52, 58.

As noted above, Plaintiffs also contend that a reversion of the rights under the Production License to Norge is certain because it allegedly is certain that MPCN will default. Specifically, Plaintiffs assert that "Ruhrgas' actions assured that MPCN will default under the Pass

Through Agreements because it no longer will be able to sell its gas to anyone after June 1996," the effective date of MPCN's attempted termination of the Heimdal Gas Sales Agreement.[12] Reply Brief (Instr. No. 67) at 25. Plaintiffs fail to make any showing of how a cessation of sales would constitute a default under the Pass Through Agreements. To the contrary, as shown below, MPCN certainly does not consider a cessation of deliveries to constitute a default which will result in a termination of its rights under the Pass Through Agreements.

MPCN's letter (on MOC letterhead)[13] to the Heimdal Operating Committee and the Heimdal Commercial Committee dated January 25, 1996, attached as Exhibit 6 to Plaintiffs' Reply Brief, gives notice of a suspension of production effective June 11, 1996 "due to not having economic reserves." The letter, a copy of which is attached hereto as Exhibit B, goes on to state that MPCN will inform the Heimdal joint venture "when, in MPCN's opinion, a resumption of MPCN's gas deliveries will be economically viable." The letter also states that MPCN will continue to take its interest in condensate. If a cessation of deliveries in June 1996 would result in a reversion of rights to Norge, there would never be "a resumption of MPCN's gas deliveries" as expressly contemplated in

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[12] Ruhrgas AG and the other European buyers have consistently objected to MPCN's attempted termination of the Heimdal Gas Sales Agreement and do not recognize it as effective.

[13] This letter represents another example of MOC personnel conducting business relating to Heimdal on behalf of MPCN.

MPCN's letter, and MPCN would not be taking any condensate during the period of suspension, as stated in the letter.

Similarly, MPCN sent a letter to Ruhrgas AG dated February 12, 1996, a copy of which is attached hereto as Exhibit C, requesting transportation for "gas delivered during the period 11 June, 1996 through 30 September, 1996." The letter concludes that "additional customers, redelivery points, and volumes may be added as we continue our marketing efforts."

The two letters attached hereto as Exhibits B and C make it clear that MPCN intends to be marketing Heimdal gas after June 11, 1996. These letters absolutely refute any contention that a June 1996 cessation of production will constitute a default under the Pass Through Agreements or that the rights under the Production License are certain to revert to Norge in June 1996.

Mr. Engzelius also refuted Plaintiffs' assertions in his deposition. Mr. Engzelius testified that it is *not* certain that MPCN will cease sales of gas in June 1996, and he specifically acknowledged the possibility that the rights assigned to MPCN under the Pass Through Agreements will *not* revert to Norge in June 1996. Engzelius Depo. at 83-87. Mr. Engzelius also admitted that it is possible that Norge would elect not to terminate the Pass Through Agreements, even if a default by MPCN occurs. Engzelius Depo. at 89. If there could be any doubt that the rights under the Production License may never revert to Norge, any such doubt is completely eliminated by the following testimony of Mr. Engzelius:

Q: Is it your understanding of the pass-through agreements that if Marathon Petroleum Company (Norway) defaults on its obligations under those pass-through agreements and if, based on that default, Marathon Petroleum Norge A/S elects to terminate those pass-through agreements –

A: Uh-huh.

Q: – then at that time the rights assigned under the pass-through agreements would then revert to Marathon Petroleum Norge A/S?

A: That is correct.

Q: That reversion has not yet occurred, has it?

A: No.

Q: *That reversion may never occur; is that right?*

A: *Depending on circumstances, that is right.*

Engzelius Depo. at 91 (emphasis added). In short, at the time of the filing of this lawsuit, at the time of the removal, and at the time of Mr. Engzelius' deposition, it was uncertain whether there would *ever* be a reversion to Norge of the rights to explore for, produce, and sell Heimdal gas, and that uncertainty continues today. As shown in Ruhrgas AG's Response to Plaintiffs' Motion to Remand (Instr. No. 64) at 32-35, the mere possibility of a future reversion of rights under the Production License to Norge constitutes at most a "possibility of reverter" which will not support any cause of action.[14]

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[14] Plaintiffs include in their Reply Brief a confusing discussion of landlord/tenant law. While Ruhrgas AG fails to

In any event, the only causes of action asserted by Norge in the First Amended Petition are for participation in an alleged breach of fiduciary duty arising out of the Operating Agreement and for tortious interference with *MPCN's* prospective business relations. As shown above, it is clear that with respect to these causes of action,

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comprehend how an assignment of rights under a production license can create a landlord/tenant relationship, it is unnecessary to analyze that issue. Even if Norge is the "landlord" of MPCN with respect to rights under the Production License, any rights of Norge in the Production License could qualify only as a future interest, not as a present interest, because Norge undisputedly does not hold the right to the immediate beneficial enjoyment of the Production License. Restatement of the Law of Property § 153(3)(a). As such, Norge, as landlord, would hold at most a reversionary interest in the Production License. ***Id***. §§ 153(1), 154(1). As noted in Ruhrgas AG's Response to Plaintiffs Motion to Remand, there are two types of reversionary interests, a "reversion" (which is not subject to a condition precedent) and a "possibility of reverter" (which *is* subject to a condition precedent). *Id*. § 154(1) and (2). Because any reversionary interest held by Norge *is* subject to a condition precedent, *i.e.*, a default by MPCN and termination by Norge, any reversionary interest held by Norge can be characterized only as a possibility of reverter. The authorities cited by Plaintiffs in their Reply Brief stand only for the proposition that a landlord may sue for injury to a "reversion," not a "possibility of reverter." Plaintiffs have not cited a single authority supporting the proposition that a holder of a future interest in property which is subject to a condition which may never occur may sue for damages to the property.

Plaintiffs also assert that if Norge holds a "possibility of reverter," it therefore has a "possibility of recovery." Reply Brief (Instr. No. 67) at 25. The opposite is true. "The holder of a bare possibility of reverter cannot maintain an action for injury to the property and may not join as a party plaintiff in such an action." 31 C.J.S. *Estates* § 105, at 205.

Norge is not a real party in interest and has no possibility of recovery. The court need not inquire further. Norge is properly ignored in determining diversity in this case, and the Motion to Remand should be denied.

III.

FEDERAL QUESTION JURISDICTION EXISTS BECAUSE PLAINTIFFS' PETITION RAISES SUBSTANTIAL FOREIGN AND INTERNATIONAL RELATIONS QUESTIONS

Plaintiffs mischaracterized this basis of jurisdiction in both their Motion to Remand (Instr. No. 12) at 2 (mistakenly labeling it as FSIA removal), and in their Reply Brief (Instr. No. 67) at 26 (mistakenly labeling it as solely act-of-state doctrine removal). Consistently, Ruhrgas AG has stated that removal is proper because Plaintiffs' well-pleaded complaint raises substantial foreign relations questions.[15] Contrary to Plaintiffs' assertions, Ruhrgas AG does not argue that "the Note Verbale and the *Amicus* Brief for the Federal Republic of Germany filed on its behalf have imbued the Plaintiffs' claims with an international aura." Reply Brief (Instr. No. 67) at 26. Plaintiffs' claims *ipso facto* raise substantial questions of foreign relations; the Note Verbale and Amicus Brief demonstrate

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[15] ***See*** Ruhrgas AG's Notice of Removal (Instr. No. 1) ¶ 7 (citing ***Kern v. Jeppesen Sanderson, Inc.***, 867 F. Supp. 525 (S.D. Tex. 1994), ***Sequihua v. Texaco Inc.***, 847 F. Supp. 61 (S.D. Tex. 1994), and ***Grynberg Production Corp. v. British Gas Corp.***, 817 F. Supp. 1338 (E.D. Tex. 1993) for the proposition that claims raising questions of foreign relations present issues of federal common law); Ruhrgas AG's Response to Motion to Remand (Instr. No. 64) at 44-48 (same).

that Ruhrgas AG was correct when it asserted that Plaintiffs' complaint raised substantial foreign relations questions.

Plaintiffs argue that Fifth Circuit authority holds that "claimed assertions of international issues are 'foreclosed by the familiar well-pleaded complaint rule.' " Reply Brief (Instr. No. 67) at 27. The Fifth Circuit case cited by Plaintiffs, ***Aquafaith Shipping, Ltd. v. Jarillas,*** 963 F.2d 806 (5th Cir.), *cert. denied,* 506 U.S. 955 (1992), actually supports Ruhrgas AG's argument. In ***Aquafaith Shipping,*** the Fifth Circuit clarified the scope of the well-pleaded complaint rule:

> The court may have to examine pleadings filed by the defendant in order to determine whether the plaintiff's complaint is in fact 'well pleaded.' Thus, when a court performs its duty to verify that it has jurisdiction, it may be required to survey the enfire record, including the defendant's pleadings, and base its ruling on the complaint, on undisputed facts, and on its resolution of disputed facts.

Id. at 808. As shown below, such a survey of the entire record in this case, including the First Amended Petition, the Note Verbale and *Amicus Curiae* brief submitted by the Federal Republic of Germany, and MPCN's European Commission Complaint served on Statoil reveals Plaintiffs' well-pleaded complaint raises a federal question.

Plaintiffs argue that "the German filings themselves demonstrate that this case does not involve questions of foreign relations." Reply Brief (Instr. No. 67) at 28. In fact,

the Note Verbale identifies a number of *independent* foreign relations concerns raised by Plaintiffs' complaint.[16] Plaintiffs' Reply, in a footnote, takes issue with only one of the concerns raised in the Note Verbale, Germany's characterization of the lawsuit's effect on the price of German gas. Reply Brief (Instr. No. 67) at 29 n.35. Plaintiffs' attempt to characterize Germany's "real" interest as a desire to see Ruhrgas AG win is without any support in the record, and is a reflection of Plaintiffs' inability to address substantively the foreign and international relations concerns identified by the Federal Republic of Germany. Furthermore, Plaintiffs offer no reply to Ruhrgas AG's argument that MPCN itself has acknowledged in its European Commission Complaint that the matters in dispute implicate foreign relations. *See* Ruhrgas AG's Response to Motion to Remand (Instr. No. 64) at 46 and European Commission Complaint ¶¶ 63, 64.

Plaintiffs cite ***Jackson v. Johns-Manville Sales Corp.,*** 750 F.2d 1314, 1325 (5th Cir. 1985) for the proposition that the Fifth Circuit has refused to usurp state law unless the asserted "interest . . . relate[s] to an articulated congressional policy or directly implicate[s] the authority and duties of the United States as a sovereign." Reply Brief (Instr. No. 67) at 27. In fact, the Fifth Circuit in ***Jackson*** quoted the United States Supreme Court decision of ***Texas Industries, Inc. v. Radcliff Materials, Inc.,*** 451 U.S.

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[16] Other courts have recognized that the protests of foreign governments deserve weight when deciding whether a plaintiff's well-pleaded complaint raises international relations questions. ***See Sequihua,*** 847 F. Supp. at 62-63; ***Grynberg Prod. Corp.,*** 817 F. Supp. at 1356-57.

630, 641 (1981), which held federal common law exists over "international disputes implicating the conflicting rights of States ***or our relations with foreign nations***. . . . In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control." ***Id.*** at 1323-24 (emphasis added).[17]

Plaintiffs claim that removal is improper because their claims are "garden-variety fraud and tort claims" and that Plaintiffs do not seek injunctive relief that would "interfere with the title to property in a foreign state." Reply Brief (Instr. No. 67) at 27-28. However, Plaintiffs cite no authority for the proposition that these factors are a prerequisite for exercising jurisdiction. To the contrary, ***Kern***, ***Grynberg*** and ***Sequihua*** illustrate they are not.

In ***Kern***, plaintiffs brought tort claims arising out of two plane crashes in Nepal; no injunctive relief was sought. Although Plaintiffs continue to mischaracterize ***Kern*** as finding a federal question only because of a "federal treaty," Reply Brief (Instr. No. 67) at 28-29, Ruhrgas AG already responded to this argument:

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[17] Plaintiffs also cite ***First Haw. Bank v. Alexander***, 558 F. Supp. 1128 (D. Haw. 1983) for the proposition that foreign relations are not implicated in this suit. Reply Brief (Instr. No. 67) at 27-28. ***Alexander*** related to whether a ***private cause of action existed under a federal statute***. It has no bearing on this suit.

> Plaintiffs offer an incomplete and inaccurate explanation of ***Kern***, stating that Plaintiffs' complaint in ***Kern*** arose under a "federal treaty" thereby creating federal question jurisdiction only on that ground. Plaintiffs' Brief in Support of their Motion to Remand (Instr. No. 13) at 10 n.2. Although that was one basis of jurisdiction in ***Kern***, the ***Kern*** court also found federal question jurisdiction existed, independently, because of the "international issues in the case." ***Kern***, 867 F. Supp. at 531-32.

Ruhrgas AG's Response to Motion to Remand (Instr. No. 64) at 47. ***Kern's*** support of subject matter jurisdiction in this case probably explains Plaintiffs continued misreading of it.

In ***Grynberg***, the court found that the plaintiffs conversion claim under Texas law for money damages raised substantial questions of international relations on which the well-pleaded complaint must rely. 817 F. Supp. at 1364-65. The court noted that the conversion claim required pleading and proof that conduct of Kazakhstan in the disposition of contract rights relating to mineral resources in Kazakhstan was unlawful, and that such an allegation "is by itself an allegation implicating federal international relations law." ***Id.*** Similarly, Plaintiffs expressly allege here that Statoil, the Norwegian state-owned oil company, undertook unlawful actions in connection with the development and transportation of Norwegian natural resources. ***See*** Plaintiffs' First Amended Petition ¶ 6, 11-13, 16-19, 20-22, 23-24, 30-32, 51-54, 57, 60-62. As in ***Grynberg***, such allegations alone implicate federal foreign relations law, supplying a basis for removal.

In ***Sequihua***, the court held that nuisance claims asserted by the plaintiffs required plaintiffs to challenge the policies, regulations, and approvals of Ecuador to show that the challenged conduct was improper. 847 F. Supp. at 62-63. Such a challenge raised substantial international relations questions invoking federal law. ***Id.*** Similarly, as noted above, Plaintiffs here challenge the actions of the Norwegian state-owned oil company in regard to the development and transportation of Norwegian natural resources.

Plaintiffs have made no substantive challenge to the foreign and international relations concerns raised by this case which have been identified by the Federal Republic of Germany and Ruhrgas AG. In fact, MPCN's allegations in its European Commission Complaint confirm that this case implicates substantial foreign and international relations issues. Plaintiffs are unable to distinguish ***Kern***, ***Sequihua***, and ***Grynberg***, which support the removal of this action. The Motion to Remand should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served on counsel of record for Plaintiffs via Certified Mail Return Receipt Requested and Federal Express on this 1st day of March, 1996.

/s/ Ben H. Sheppard, Jr.
BEN H. SHEPPARD, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL COMPANY,	§	
MARATHON INTERNATIONAL	§	
OIL COMPANY, and	§	**CIVIL ACTION**
MARATHON PETROLEUM	§	**NO. H-95-4176**
NORGE A/S,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	
RUHRGAS, A.G.,	§	
	§	
Defendant.	§	

PLAINTIFFS' SURREPLY TO MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, and MARATHON PETROLEUM NORGE A/S,	§	**CIVIL ACTION NO. H-95-4176**
Plaintiffs,	§	
v.	§	
RUHRGAS, A.G.,	§	
Defendant.	§	

PLAINTIFFS' SURREPLY TO MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Plaintiffs Marathon Oil Company, Marathon International Oil Company and Marathon Petroleum Norge A/S file this Surreply in opposition to Ruhrgas' motion to dismiss for lack of personal jurisdiction.

I. Specific Jurisdiction

Ruhrgas wrongly claims that the causes of action at issue in this case did not "arise" in Texas. But the question is *not* limited to whether the cause of action "arose" in Texas or the United States. Nor is the "arising from" component so limited. Instead, as stated by the Supreme Court, the question is whether the cause of action arises in *or relates to* the defendant's contact with the forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S.Ct. 2174, 2183 (1985); *Trinity Industries, Inc. v. Myers &*

Assocs., Ltd., 41 F.3d 229, 230 (5th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 52 (1995). A cause of action arises from or relates to a forum contact where a "but for" relationship exists between the contact and the cause of action. *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1270 (5th Cir. 1981). Personal jurisdiction is also proper where the defendant's acts outside the forum have foreseeable effects within the forum. *Id.* at 1269. Plaintiffs complain here of being misled about the circumstances surrounding the development of the Heimdal gas field. In particular, Plaintiffs claim that there was an [sic] material, undisclosed relationship between Ruhrgas and Statoil. The evidence confirms numerous trips and telexes directed to Plaintiffs in Houston dealing with the Heimdal field and its attendant profitability. Were it not for these communications, Plaintiffs would not have been induced to fund the venture. Thus, these contacts, standing alone or considered together, would support specific jurisdiction. Similarly, jurisdiction is also proper under an effects analysis; Ruhrgas knew that MOC and MIOC were based in Houston, but failed to reveal its relationship with Statoil or to divulge the true plans for the development of North Sea gas throughout the 1980's.

A. The "Arising From" Test.

A cause of action "arises from" contacts with the forum state if, considering the course of events involved in the claim, the contacts form an integral part of the defendant's tortious activity. *See Burger King*, 471 U.S. at 479, 105 S.Ct. at 2185 (court should consider prior negotiations, future consequences and parties' actual course of dealing); *State Street Capital Corp. v. Dente*, 855 F.Supp.

192, 195 (S.D. Tex. 1994) (same). Ruhrgas' tortious conduct clearly included the series of meetings in Houston and its voluminous correspondence and telecommunications with Marathon entities in Houston.

Contrary to Ruhrgas' arguments, the 1987 Houston meeting was a significant element in its tortious plan. For the first time, Ruhrgas claimed that because of lack of a government approval for Distrigaz, a Belgian company with a 15% interest in the Heimdal gas, it had *no* obligation to purchase Heimdal gas at the promised price. **Exhibit A.** Using that "governmental approval" excuse, Ruhrgas underpaid its obligations for years before it was required in an arbitration to bring its obligations current. Ruhrgas did not immediately pay the arbitration award, however, but used it as a bargaining chip in the Houston negotiations. Moreover, the arbitration result excluded the Distrigaz gas volumes from the ongoing agreement, *and* Ruhrgas refused to provide transportation to sell this gas to any other buyers. This was the background for the next two meetings in Houston, which simply implemented Ruhrgas' plan to lower the Heimdal price with the ongoing threat to Marathon of the total loss of revenue for the Distrigaz volumes.

Ruhrgas' actions aimed at tortiously controlling, and denying, access to European markets continued, reflected in its refusals to provide transportation information as shown in correspondence *to Houston*, even into 1996. **Exhibit B.** Thus, Ruhrgas' scheme to persuade Plaintiffs to fund the pipeline system that effected the Ruhrgas stranglehold on Heimdal gas culminated in the series of meetings and communications *purposefully directed* to Plaintiffs in Houston.

These numerous contacts with Texas, as well as the visits of Ruhrgas employees to Texas for the express purpose of negotiations regarding the Heimdal field establish that Ruhrgas reasonably should have anticipated that it could be haled into court in Texas. *See Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 420-21 (5th Cir. 1993). Specific jurisdiction exists where, as here, the business contacts with the forum are allegedly designed to further the scheme to defraud. *See Dent Mfg., Inc. v. Zafir*, No. 94-2532, 1995 U. S. Dist. LEXIS 15045, at *36 (E.D. Pa. Oct. 12, 1995).

Here Ruhrgas knowingly reached out to Plaintiffs through its communications, as well as visits to Texas, to effect its plan to fund the pipeline to Emden, then to ensure the flow of gas from 1986 to the present at below the agreed price. Thus Ruhrgas' contacts constituted a purposeful availment of this forum. *See Burger King*, 471 U. S. at 480-81, 105 S. Ct. at 2186 (defendant "reached out" to forum state and envisioned continuing and wide ranging contacts with plaintiff); *First Miss. Corp. v. Thunderbird Energy, Inc.*, 876 F. Supp. 840, 844 (S.D. Miss. 1995) (defendants "reached out" through negotiations by letter, facsimile and telephone); *Fabry Glove & Mitten Co. v. Spitzer*, 908 F. Supp. 625, 632 (E. D. Wis. 1995) (defendant deliberately engaged in a "continuing business relationship" with forum plaintiff).

Ruhrgas' plan was effected by omissions as well as misrepresentations. Ruhrgas' failure to disclose the nature and extent of its secret relationship with Statoil and its knowledge of North Sea gas transportation routes during the course of the Texas meetings constitutes fraud. The failure to disclose material facts during the course of

meetings within the forum certainly is relevant to the jurisdictional question.[1] In Texas, a person has a duty to disclose material facts in connection with commercial negotiations where, among other things, he should know that his opponent relies on the non-existence of the fact.[2]

Ruhrgas' purpose in the three Houston visits was to first announce that the parties had no agreement, then to negotiate a new agreement through fraud and duress. Plaintiffs' claim could thus hardly arise more directly from Ruhrgas' Texas contacts. *See Sherman Assocs. v. Kals*, 899 F. Supp. 868, 871 (D. Conn. 1995) (defendant came to forum to solicit business relationship that led to litigation); *Enviroplan, Inc. v. Western Farmers Elec. Co-Op.*, 900 F. Supp. 1055, 1061 (S. D. Ind. 1995) (visits necessitated by issues related to performance of agreement held purposeful availment). These numerous contacts were, of course, meaningful to the Ruhrgas scheme, and hence Plaintiffs' claims, and even *one* such contact is sufficient. *Pritzker v. Yari*, 42 F.3d 53, 61 (1st Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1959 (1995) (*citing McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957)).

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[1] *E.g., WNS, Inc. v. Farrow*, 884 F.2d 200 (5th Cir. 1989) *Pizzabiocche v. Vinelli*, 772 F. Supp. 1245, 1250 (M.D. Fla. 1991); *Rockshots, Inc. v. Comstock Cards, Inc.*, No. 87-CIV. 3453-CSH, 1990 WL 74514, at * 2 (S.D.N.Y. May 29, 1990).

[2] *See generally Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432 (Tex. 1986); *Chase Comm. Credit Corp. v. Datapoint Corp.*, 774 S.W.2d 359 (Tex. App. – Dallas 1989, no writ); *Moore & Moore Drilling Co. v. White*, 345 S.W.2d 550, 555 (Tex. Civ. App. – Dallas 1961, writ ref'd n.r.e.); *Moore v. Dallas Post Card Co.*, 215 S.W.2d 398, 403 (Tex. Civ. App. – Dallas 1948, writ ref'd n.r.e.).

B. The "Relatedness" Test

The disjunctive nature of the *Burger King* specific jurisdiction test, "aris[ing] out of or relat[ing] to," "portends added flexibility and signals a relaxation of the applicable standard." *Ticketmaster – New York, Inc. v. Alioto*, 26 F.3d 201, 206 (1st Cir. 1994); *Pritzker*, 42 F.3d at 62 ("relatedness test is, relatively speaking, a flexible, relaxed standard"). So it is little wonder Ruhrgas ignores this element of the calculus.

When a cause of action is connected to negotiations in the forum, even if the claim did not *arise from* these negotiations,[3] the constitutional requirement is satisfied. *See Southwire Co. v. Trans-World Metals & Co.*, 735 F.2d 440, 442 (11th Cir. 1984). What is required is that the defendant's forum contacts place it in "tortious striking distance of the plaintiff." *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1270 n.21 (5th Cir. 1981); *see Nowak v. Tak How Investments, Ltd.*, 899 F. Supp. 25, 29-30 (D. Mass. 1995) (applying *Prejean* test).

It cannot seriously be claimed that meetings in Texas with "representatives of MPCN," who Ruhrgas knew to be employees of the Plaintiffs, do not "relate to" this litigation, the defendant and the forum. It should have been obvious that the information from these meetings would be shared with the Plaintiffs – indeed, Ruhrgas' discussions regarding the Heimdal field were made to employees of MOC.[4] Likewise, Ruhrgas knew that

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[3] Here, of course, Plaintiffs' claims also directly arose from Ruhrgas' Texas contacts.

[4] In fact, Ruhrgas executives met directly with top officials of Plaintiffs. **Exhibit A; Deposition of Wolf-Dietrich Hoffman at 183-84 (Exhibit C).**

information it sent by telex would be provided to Plaintiffs. In fact, many of these telexes were sent directly to Plaintiffs. Thus, not only was this communication foreseeable, it was deliberate.

The future consequence and, indeed, object of Ruhrgas' forum activity was to trap Plaintiffs into funding a one-sided transaction, wherein Plaintiffs' affiliate could sell Heimdal gas only through Emden, only to the Consortium, and only on terms under the sole dictate of the Consortium. At the least, Ruhrgas' Texas contacts formed the "intermediate step" that led to its real object. *See Burger King*, 471 U. S. at 479, 105 S.Ct. at 2185. Thus, the relatedness requirement is satisfied. *See Nowak v. Tak How Investments, Ltd.*, 899 F. Supp. at 31.

C. The "Effect" in Texas

In an effort to deflect from its substantial contacts with Texas, Ruhrgas now urges that its actions could only have caused foreseeable damage to MOC and MIOC in Ohio, where they previously were headquartered, but not Houston, where these Plaintiffs relocated in 1983.[5] This argument overlooks Plaintiffs' specific allegation that "Ruhrgas has participated **in a series of interconnected wrongful acts** relating to the solicitation of funding,

[5] Essentially, Ruhrgas' argument is that they defrauded Plaintiffs while they were in Ohio, and that by the time they moved to Houston, the damage already had been done. Ruhrgas was aware. however, by 1983 (**Exhibit D**) that Plaintiffs had moved their offices to Houston, and communicated directly with Houston thereafter. *E.g.*, Exhibit 3 to Pls' Resp. to Motion to Dismiss for Lack of Personal Jurisdiction.

development, and subsequent operations of gas fields. . . . **The wrongful conduct alleged in this petition has been continuing for many years, has caused continuing injury to the plaintiffs, and is still ongoing.**" Pet. ¶ 6 (emphasis added). In other words, even if the initial fraud took place while some of the Plaintiffs were Ohio residents, Plaintiffs allege that the fraud continued long after they moved to Houston, and has caused them continuing damages every year.[6]

It has been found constitutionally sufficient that jurisdiction be based on an act outside the forum which results in injury within the forum. *Star Brite Distributing, Inc. v. Gavin*, 746 F. Supp. 633, 636 (N.D. Miss. 1990) (*prima facie* allegation of fraud that injured persons within state held sufficient). And although Ruhrgas had extensive contacts with Texas, no actual physical act in the United States is necessary if outside activities have foreseeable consequences within the state. *Standard Fittings Co. v. Sapag, S.A.*, 625 F.2d 630, 643 (5th Cir. 1980), *cert. denied*, 451 U.S. 910, 101 S.Ct. 1981 (1981); *see also Blanchard & Co. v. Spectrum Numismatics, Inc.*, No. 93-2554, 1994 U.S. Dist. LEXIS 15369, at *8 (E.D.La. Oct. 26, 1994) (foreseeable that effects of contractual breach and tortious interference would be felt within state when moneys not properly remitted to resident plaintiff); *Snow v. American Morgan Horse Ass'n, Inc.*, No. 93-463-JD, 1994 U.S. Dist. LEXIS 13602, at *22 (D.N.H. Sept. 20, 1994) (knowledge

[6] Plaintiffs' advances to MPCN did not stop in the early 1980's; instead, such advances continued to be made based on Ruhrgas' fraudulent omissions and misrepresentations for well over a decade.

that impact would be felt in forum constitutes purposeful contact or substantial connection so that jurisdiction is proper over tortfeasor).[7]

Ruhrgas knew that its actions would result in a loss of $500 million to Plaintiffs. **Exhibit E.** While, according to Dr. Hoffman, this may not be a significant amount to Ruhrgas, such a loss was certainly an impact of constitutional dimension to Plaintiffs, and not only foreseeable but a certainty to Ruhrgas as it implemented its tortious strategy.

II. General Jurisdiction

Ruhrgas relies primarily on *Helicopteros*[8] for its argument that general jurisdiction is hardly ever present, and is not established here. But, to the contrary, general jurisdiction is appropriate when forum contacts are "continuous and systematic," the key distinction in this case and *Helicopteros*.

Ruhrgas exaggerates the contacts in *Helicopteros* while inaccurately minimizing its own links with Texas. Helicol, the non-resident in *Helicopteros*, had one executive level meeting in Texas; its other visits were temporary training visits as part of the purchase of a package of

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[7] In comparison the claim at issue in *Southmark* concerned an oral agreement negotiated in "Atlanta and/or New York," and there was no evidence the non-resident aimed at, or even knew its actions could affect, the Texas forum. *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 772-73 (5th Cir. 1988).

[8] *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 413, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984).

goods. *Helicopteros*, 466 U.S. at 411-17.[9] In contrast, Ruhrgas' high level executives met three times in Houston to discuss Heimdal and now attend more than a dozen meetings in Texas a year (not to mention the numerous meetings Ruhrgas executives attend each year for their other businesses across the United States). Instead of brief training visits, Ruhrgas maintains employees full time in Houston as part of its work with TERC, which, in turn, is intended to effect its aim to enter the United States gas market. **Exhibit F.** Of course, Ruhrgas' interest in the United States, and especially Texas, is understandable given that – unlike Helicol – it has substantial business holdings here and two of its largest shareholders are United States oil companies.

Ruhrgas' contacts with the United States generally, as discussed in Plaintiffs' Response, are extensive, systematic and have been continuous for a number of years. Ruhrgas makes little attempt to dispute the extent of these contacts, but coyly argues that Fed. R. Civ. P. 4(k)(2) may be inapplicable since Plaintiffs haven't proved

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[9] Respondents' Brief in the United States Supreme Court admitted that:

> "[Helicol] did no advertising in the United States; did no recruiting in the United States had no agent for service in the United States; signed no contracts in the United States; had no employees located in the United States; had no officers or directors located in the United States; had no stockholders in the United States; did no work in the United States; and had no offices in the United States."
>
> Dennis G. Terez, *The Misguided* Helicopteros *Case: Confusion in the Courts over Contacts*, 37 Baylor L. Rev. 913, 922 n.49 (1985).

Ruhrgas is *not* subject to jurisdiction in one of the fifty states. But Plaintiffs have met their burden by asserting the applicability of Rule 4(k)(2), and Ruhrgas does not assert that it is subject to jurisdiction elsewhere so as to obviate the Rule. If the Court finds federal question jurisdiction, Ruhrgas' United States contacts establish personal jurisdiction as well.

III. Conclusion

Ruhrgas has repeatedly visited and corresponded with Plaintiffs and their affiliate in Texas – in connection with the Heimdal gas field and with the very issues before the Court. Ruhrgas also maintains a constant presence in Texas through its own employees and its other business activities conducted by its affiliates in Texas. Ruhrgas is subject to specific and general personal jurisdiction in Texas and may constitutionally be haled into a Texas court. Its motion to dismiss should be denied.

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CERTIFICATE OF SERVICE

A copy of this document was served on Defendant's attorneys of record in accordance with Federal Rule of Civil Procedure 5 on March 4, 1996.

/s/ David Schenck

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, and MARATHON PETROLEUM NORGE A/S,	§	CIVIL ACTION NO. H-95-4176
Plaintiffs,	§	
v.	§	
RUHRGAS, A.G.,	§	
Defendant.	§	

RUHRGAS AG'S RESPONSE TO PLAINTIFFS' SURREPLY TO MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Ruhrgas AG respectfully submits this Response to Plaintiffs' Surreply to Motion to Dismiss for lack of personal jurisdiction.

1. In the various motions and responses which have been filed with the Court since the inception of this case, Plaintiffs have continually made factual assertions concerning alleged wrongful conduct of Ruhrgas AG without any evidentiary support. Plaintiffs continue this practice in their Surreply to the Motion to Dismiss for lack of personal jurisdiction (Instr. No. 69). Plaintiffs claim without evidentiary support that they were "misled" by communications made in the three meetings in Houston and in telexes sent by Ruhrgas AG to Houston, and that "were

it not for these communications, Plaintiffs would not have been induced to fund the venture." Surreply (Instr. No. 69) at 2.

2. The time has passed for making broad allegations unsupported by any evidence Plaintiffs' burden in responding to a motion to dismiss for lack of personal jurisdiction is to come forward with *prima facie evidence* of a tort committed by Ruhrgas AG in Texas. ***See Southmark Corp. v. Life Investors, Inc.,*** 851 F.2d 763, 772-73 (5th Cir. 1988). Plaintiffs have not come forward with a shred of evidence showing that they were "misled" as a result of anything that was said to Marathon Petroleum Company (Norway) ("MPCN") in any of the three Houston meetings or as a result of any of the correspondence sent to Texas in connection with Ruhrgas AG's dealings with MPCN under the Heimdal Gas Sales Agreement. Plaintiffs have not come forward with a shred of evidence showing that "Plaintiffs would not have been induced to fund the venture" if not for statements made in the three Houston meetings or the correspondence sent to Texas. The factual assertions made in the Surreply are not supported by any evidence. In fact Plaintiffs' factual assertions are contrary to the record before the Court. For example, Plaintiffs assert in the Surreply that Ruhrgas AG sent a letter (Deposition Exhibit 175) to Houston in November 1989 which constitutes conduct of Ruhrgas AG in Texas. Surreply to Motion to Dismiss (Instr. No. 69) at 3 and Exhibit B thereto. In fact, the record shows that that

letter is an unsigned draft. Hoffmann Depo. at 273. Plaintiffs first saw that letter when it was produced by Ruhrgas AG in the discovery in this case.[1]

In short, Plaintiffs have failed to meet their burden of presenting *evidence* of a tort committed by Ruhrgas AG in Texas.

3. Plaintiffs also argue in their Surreply that their causes of action need not arise out of Ruhrgas AG's Texas Contacts. Plaintiffs urge that it is sufficient if those causes of action "relate to" those contacts. It is clear, however, that in the Fifth Circuit, the defendant's contacts with the forum state must be "directly related" to the cause of action to establish specific jurisdiction. ***Wilson v. Belin,*** 20 F.2d 644, 647 (5th Cir. 1994). Plaintiffs have failed to come forward with any evidence of a direct link between the three Houston meetings or the Houston correspondence and the alleged causes of action. Marathon's own minutes of the Houston meetings and the correspondence sent to Houston reflect only matters concerning performance and negotiations between Ruhrgas AG and the other European buyers and MPCN under the Heimdal Gas Sales Agreement. ***See*** Exhibits 2, 3, and 7 to Plaintiffs' Response to Motion to Dismiss.

4. Plaintiffs suggest that Ruhrgas AG's contacts with Texas in the course of its contractual relationship with MPCN allows the assertion of specific jurisdiction,

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[1] The table attached hereto as Appendix A reflects some of the other wrong factual assertions made by Plaintiffs in their Surreply. Ruhrgas AG denies all of Plaintiffs' factual assertions.

even if there is no direct relationship between those contacts and Plaintiffs' causes of action. As noted above, this is not the law in the Fifth Circuit. Furthermore, it cannot be said, as argued by Plaintiffs, that Ruhrgas AG purposely availed itself of the benefits and protections of Texas law, or that Ruhrgas reasonably could have anticipated being haled into court in Texas by virtue of its contractual dealings with MPCN. Plaintiffs' argument is refuted by the terms of the contract itself. The Heimdal Gas Sales Agreement expressly provides that it shall be governed by the laws of Norway, and that any disputes arising out of or relating to the Agreement will be resolved in arbitration in Stockholm, Sweden. In their dealings under the Heimdal Gas Sales Agreement, Ruhrgas AG and MPCN were invoking the benefits and protection of *Norwegian* law, and could only anticipate being haled into *arbitration* in *Sweden*. Further, the subject matter of the agreement, Norwegian gas, is located outside of Texas, the agreement was negotiated and signed in Europe, all payments for the gas have been made outside of Texas, and so performance under the agreement was to occur in Texas. These facts make this case unlike any of the cases cited by Plaintiffs in their Surreply. To the contrary, the Fifth Circuit's decision in ***Hydrokinetics, Inc. v. Alaska Mechanical, Inc.,*** 700 F.2d 1026 (5th Cir. 1983) ***Cert. denied,*** 466 U.S. 962 (1984), demonstrates that personal jurisdiction in Texas cannot be predicated on the contractual dealings between Ruhrgas AG and MPCN.

In ***Hydrokinetics,*** a Texas corporation brought a breach of contract claim against an Alaskan corporation

arising out of the manufacture of goods in Texas. Payment for the goods by the Alaskan corporation was to be made in Texas, the parties engaged in extensive communications in Texas, officers of the Alaskan corporation traveled to Texas to finalize the agreement and to resolve disputes under the agreement, and the contract was formally created in Texas. Nevertheless, the Fifth Circuit held that these contacts were not sufficient to establish specific jurisdiction, noting that the agreement provided that Alaska law would govern, and that no performance under the contract was to take place in Texas, other than payment for the goods. *Id.* at 1028-29.

The contractual dealings involved in ***Hydrokinetics*** are indistinguishable from those involved here. In fact, a more powerful case for dismissal is presented here by virtue of the arbitration clause in the Heimdal Gas Sales Agreement providing for arbitration of disputes in Sweden, which conclusively shows that Ruhrgas AG could not have reasonably anticipated being haled into court in Texas by virtue of its dealings with MPCN in connection with the Heimdal Gas Sales Agreement.

5. Plaintiffs' only remaining argument for specific jurisdiction is that Plaintiffs allegedly suffered injuries in Texas. Yet, the U.S. Supreme Court has expressly rejected the argument that the foreseeability of causing injury[2] in the forum state is sufficient to establish personal jurisdiction:

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[2] Ruhrgas AG denies that it has caused injuries to Plaintiffs, and further denies that any such injuries were foreseeable in Texas or elsewhere.

> Although it has been argued that foreseeability of causing *injury* in another State should be sufficient to establish such contacts there when policy considerations so require, the Court has consistently held that this kind of foreseeability is not a 'sufficient benchmark' for exercising personal jurisdiction. Instead, 'the foreseeability that is critical to due process analysis is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1984) (citing ***World-wide Volkswagen Corp. v. Woodson,*** 444 U.S. 286, 295 (1980) (emphasis in original) (footnote omitted)). As shown above, Ruhrgas AG could not have reasonably foreseen being haled into court in Texas as a result of its contractual dealings with MPCN.

Ruhrgas AG respectfully submits that its Motion to Dismiss for Lack of personal jurisdiction should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on counsel of record for Plaintiffs via Federal Express this 8th day of March, 1996.

/s/ Ben H. Sheppard, Jr.
BEN H. SHEPPARD, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, and MARATHON PETROLEUM NORGE A/S,	§	**CIVIL ACTION NO. H-95-4176**
Plaintiffs,	§	
v.	§	
RUHRGAS, A.G.,	§	
Defendant.	§	

PLAINTIFF'S RESPONSE TO SURREPLY TO MOTION TO REMAND

Typically, one would assume that a motion had been fully briefed once the Reply brief had been filed. A Surreply brief, if necessary, generally would focus only on new matters raised by the Reply brief. Because Ruhrgas' twenty-three page Surreply brief exceeds these accepted parameters, Plaintiffs file the following response.

I. The Arbitration Canard

Rhurgas' assertion that *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 630 (1985) require this Court to ignore U.S. legal principles in determining whether there is any basis for arbitration is palpably

wrong. In fact, *Mitsubishi* itself confirms that this question is resolved as a matter of federal law[1] by reference to generally recognized principles of contract. 473 U.S. at 625-26; *accord First Options of Chicago v. Kaplan*, 115 S. Ct. 1920 (1995); *Becker Autoradio U.S.A., Inc. v. Becker Autoradwerk*, 585 F.2d 39, 43 (3d Cir. 1978); *In re Ferrara, S.p.a.*, 441 F. Supp. 778, 780 (S.D.N.Y. 1977), *aff'd*, 580 F.2d 1044 (2d Cir. 1978). Moreover, neither *Mitsubishi* nor *Scherk* even addressed the question of whether the parties had agreed to arbitrate; it was undisputed in each case that the parties had made such an agreement. Instead, the only question before the Court in both cases was whether U.S. law made their particular claims unarbitrable.

A. The Reference to ICC Rules Did Not Endorse The "Group of Companies" Rule That Ruhrgas Would Have This Court Create

Ruhrgas' argument that Plaintiffs consented to arbitration because the MPCN/Ruhrgas contract refers to ICC rules is absurd. As Ruhrgas has acknowledged, none of the plaintiffs were even parties to that contract, so they could not have "consented" to the incorporation of the

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[1] The parties in that case were Swiss and Japanese Corporations. The agreement provided for arbitration in Japan according to Japanese rules. The agreement also provided for the application of Swiss substantive law. *Mitsubishi Motors Corp. v. Soler-Culver Co.*, 723 F.2d 155, 159 n.3 (1st Cir. 1987). (Nonetheless, the Supreme Court concluded, as had the First Circuit, that U.S. law of contract governed the antecedent question of whether an agreement to arbitrate existed.

loose notions of international law to which Ruhrgas now subscribes.[2]

1. Not even *Dow* suggest the rule Ruhrgas proposes.

While Ruhrgas urges that the Court should "follow" international law by binding corporate affiliates to each others' contracts simply because they are affiliated, Ruhrgas' argument does not even track foreign international law, let alone controlling U.S. law. Thus, when urging this Court to adopt its "all affiliates must arbitrate rule," Ruhrgas actually is asking the Court to create new law, not only for the United States but for the entire globe.

As Plaintiffs previously have explained, the *Dow* decision does not address the situation in which a non-party to the contract is compelled to arbitrate. Ruhrgas dismisses this reading as mere "wishful thinking" and continues inexorably to recite its *Dow* refrain.[3] *See* Ruhrgas Reply to Mot. to Reconsider (filed 12/22/95) at 7. Plaintiffs' reading of *Dow*, according to Ruhrgas, would

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[2] *See United States v. Flattum*, No. 93-30126, 1994 WL 88887, at *1 (9th Cir. 1994) (forum selection clause applies only to parties to contract); *National Hydro Sys. v. Summitt Corp.*, 731 F. Supp. 264, 267 (N.D. Ill. 1989) (choice of law clause discounted where contract was in question).

[3] Despite its constant repetition of the *Dow* argument, Ruhrgas has yet to explain how even the signatories to the MPCN/Ruhrgas contract silently could have intended to incorporate the reasoning of a controversial Parisian appellate decision that had not even been translated from French or published at the time the contract was signed.

be untenable, as it would be contrary to the rule of mutuality if the companies related to the party requesting arbitration could join in an ongoing arbitration by consent while the opponent could not demand their inclusion. That much is correct – such a rule would be untenable – but the failing is with the *Dow* opinion itself, not with Plaintiffs' interpretation of it.

This is exactly why most courts, apart from the handful of cases on which Ruhrgas originally relied, have rejected the *Dow* approach and have refused to permit third-parties to join a contractually agreed-upon arbitration even if they later consent. *E.g., Britton v. Co-op Banking Group*, 4 F.3d 742 (9th Cir. 1993). European commentators have read *Dow* exactly as the Plaintiffs have – only to permit the party seeking arbitration to join its affiliates where they consent. Predictably, they also have criticized the opinion as unsound.

> Any move toward permitting the joinder of claimants more easily than defendants is unfortunate. The parties should, wherever possible, know, from the time the contract is made, who may be involved in an arbitration, so as to raise any objections that they may have to the participation of that party at the earliest possible stage. It is rather objectionable that a company may or may not be bound by the arbitral clause depending on whether he is a claimant or a respondent.

Adam Samuel, *Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, U.S. and West German Law* 103 (Zurich 1989) (attached).

2. Even properly read, *Dow* does not reflect a generally accepted international rule.

Not only does a proper reading of *Dow* reveal that it is inapposite, contrary to Ruhrgas' "reference-to-the-ICC" argument, the decision hardly reflects the European arbitration zeitgeist. In fact, *Dow* has been roundly rejected in Europe even in connection with a claimant's attempt to join willing corporate affiliates. As Samuel explains, "A more fundamental objection applies to the reasoning in the *Dow Chemicals* case, regardless of the position of the party sought to be joined. Neither the arbitral tribunal nor the French court, which upheld the former's decision, laid down any clear guidelines by which one could predict in advance if and how many companies a group will be made parties to an arbitral agreement signed by a member of the conglomerate." *Id.* at 104. "A more satisfactory approach can be found in a recent French Cour de cassation decision and a Swiss ICC award in which applications to join the beneficiary of the contract and the non-signatory members of the respondent's group of companies *were rejected*." *Id.* (emphasis added). Citing a U.S. district court decision, Samuel points out that companies are quite able to include as parties all members of a so-called group where that is their intention. *Id.* n.150 (citing *Dighello v. Busconi*, 673 F. Supp. 85, 88 (D. Conn. 1987)).

B. Talbott Bigfoot (note)

The parties have briefed the *Talbott Big Foot* dicta *ad nauseum*, and Plaintiffs will resist the urge to delve into those issues further. The case speaks for itself, and its working cannot be tortured into providing authority for

the untenable proposition that one who never has agreed to arbitrate his claims can be compelled to do so. Ruhrgas' contention that *Astron* somehow supports the notion of free wheeling "privity" among corporate affiliates is erroneous. While the *Astron* opinion's curt analysis left much to be desired, subsequent decisions applying *Astron* have confirmed that there must be a showing of alter ego for those principles to apply. *E.g., Dudley v. Smith*, 504 F.2d 979, 982 (5th Cir. 1974); *Hart v. Yamaha-Parts Disrib., Inc.*, 787 F.2d 1468, 1472 (11th Cir. 1986) (applying *Astron* and Fifth Circuit law). There is no such issue here.

II. The Fraudulent Joinder Issue

Ruhrgas' continuing argument that Norge was fraudulently joined is demonstrably wrong and should be rejected. No one disputes that Norge owns legal title to the Heimdal field's production license. In its Surreply, Ruhrgas points to Amendment 2 to the Heimdal Joint Operating Agreement[4] as evidence that MPCN now has "all rights and benefits" attributable to Norges' interest in the field. If that were the case, however,then there would be no reason for the Heimdal partners ever to recognize Norge's interest in the field following Amendment 2's execution. Nevertheless, Amendment 3 to the Joint Operating Agreement unmistakably refers to *Norge's* partnership

[4] *See* Exhibit 59 to Ruhrgas' Response to Motion to Remand.

interest – thereby confirming that Norge has a "real" interest in the field.[5]

Ruhrgas' assertion that Norge possibly may never exercise its reversionary rights seems intentionally misleading. Although Finn Engzelius testified in December, 1995, that the date of any such reversion was uncertain, he *never* testified that such a reversion would *not* occur. Indeed, while the eventual termination of the Pass Through seemed clear from the outset, much has happened since Mr. Engzelius was deposed. For instance, the Heimdal partners have been informed that MPCN no longer will sell gas after its agreement with the Consortium terminates in June, 1996,[6] and the Heimdal field's operator has advised MPCN that such conduct will constitute a default of its obligations.[7] Accordingly, after June 11, 1996, MPCN will be in default under the Pass Through Agreements because it no longer will be performing its obligations under the Joint Operating Agreement. Norge previously has alleged that it will terminate the Pass Through Agreements upon MPCN's default[8] – thus, in addition to Norge's other rights, actual reversion of the rights previously assigned to MPCN is imminent.[9]

[5] A copy of Amendment 3, which naturally post-dates Amendment 2, is attached as the last two pages of Exhibit 1 to Plaintiff's Reply Brief in Support of their Motion to Remand.

[6] *See* Exhibit 6 to Plaintiff's Reply Brief in Support of their Motion to Remand.

[7] *See* Exhibit "B" attached hereto.

[8] *See* Plaintiff's Reply Brief in Support of their Motion to Remand at 24.

[9] The February 12, 1996 letter attached as Exhibit C to Ruhrgas' Surreply does not imply otherwise. All that letter

To say that Norge is not a real party in interest under these circumstances is to ignore the reality Ruhrgas' actions have created.

Of course, the certainty of Norge's reversion is irrelevant to the remand issue to some degree. Despite Ruhrgas' citation to a 1961 Connecticut case to the contrary, numerous cases have held that bare legal title alone is sufficient to make one a real party in interest.[10] It is undisputed that Norge owns legal title to the Heimdal Production License, and its claims in this case concern damages Ruhrgas has caused to that interest. Furthermore, Norge clearly has a cause of action for Ruhrgas' participation in Statoil's breach of fiduciary duty to Norge.[11] Thus, for all the smoke Ruhrgas continues to

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indicates is that MPCN was hoping to continue gas sales if Ruhrgas would enable it to deliver gas to other buyers. Ruhrgas refused. The February 26, 1996 default notice (attached hereto as Exhibit B) post-dates that letter, and proves that reversion is about to occur.

[10] *See Bergkamp v. New York Guardian Mortg. Corp.*, 667 F. Supp. 719, 724 (D. Mont. 1987) (holder of "bare legal title" is an "indispensable party); *Protection Sprinkler Co. v. Lou Charno Studio, Inc.*, 888 S.W.2d 422, 424 (Mo. App. 1994) (assignee of claim). Further, Norge's rights in the field are governed by Norwegian legislation requiring its permanent participation in the field. If any parallel to U.S. property law is appropriate, it is to the interest of a patent holder, who remains a proper party notwithstanding an assignment, complete or partial, of rights under the patent. *E.g., Pipeliners, Inc. v. American Pipe & Plastics, Inc.*, 893 F. Supp. 704, 705 (S.D. Tex. 1995); *Pfizer, Inc. v. Elan Pharmaceutical Research Corp*, 812 F. Supp. 1352, 1356 (D. Del. 1993).

[11] *See* Plaintiffs' Reply Brief in Support of their Motion to Remand at 17-18. In its Surreply, Ruhrgas' failed to respond to this rather obvious flaw in its logic.

blow, it has not met its burden of proving that Norge was fraudulently joined in this case.

III. International Issues

Despite Ruhrgas' undisputed close ties to its own government, it cannot create a federal question simply by convincing the German government to file a brief in this case. The second section of Article III of the Constitution spells out the federal courts' subject matter jurisdiction in exacting detail. There is no general federal common law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

To be sure, a handful of cases have been decided in which the plaintiff's claims have "arisen" under international law and have thus fallen within the limited original jurisdiction of the federal courts, or the even more restricted removal jurisdiction. The key to these cases, however, is the claim presented in the plaintiffs' petition. Where the plaintiff claims that the acts of a hostile foreign government should be recognized by the United States or that title to property in foreign lands should be resolved, federal common law has been created and otherwise applicable to state law has been preempted. *E.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). But a private damage action between corporations does *not* arise under the federal common law by virtue of the fact that the corporations are citizens of different countries. Nor is such a claim transformed into a claim arising under federal common law by virtue of one litigant obtaining the assistance of its own government. The Fifth Circuit made this point abundantly clear in *Aquafaith Shipping, Ltd. v. Jarillas*, 963 F.2d 806, 809 (5th Cir. 1982)

(stressing that focus is on plaintiff's petition and finding no basis for "international issue" jurisdiction despite the presence of foreign corporate defendants).

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this document was served on Defendant's attorneys of record in accordance with Federal Rule of Civil Procedure 5, on March 19, 1996.

/s/

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, AND MARATHON PETROLEUM NORGE A/S,	)	CIVIL ACTION NO. H-95-4176
Plaintiffs,	)	
vs.	)	
RUHRGAS, A.G.,	)	
Defendant.	)	

MEMORANDUM AND ORDER

(Filed Mar. 29, 1996)

Pending before the Court in the above styled case are:

(1) Ruhrgas, A.G.'s ("Ruhrgas") Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(2) (Instrument #4) for lack of personal jurisdiction;

(2) Ruhrgas's Motion to Dismiss on *Forum Non Conveniens* Grounds (Instrument #8).

(3) plaintiffs Marathon Oil Company ("Marathon"), Marathon International Oil Company ("MIOC"), and Marathon Petroleum Norge A/S's ("Norge") Motion to Remand (Instrument #12); and

(4) Ruhrgas's Motion for Reconsideration of Order Denying Motion for Stay Pending Arbitration, or in the Alternative, To Vacate and

Defer Ruling Pending Discovery (Instrument #39).

The parties have performed discovery on these jurisdictional motions and have had the opportunity to fully brief the issues. Additionally, the Federal Republic of Germany has filed an Amicus Brief in Support of Ruhrgas (Instrument #58). Although the amicus brief at best only reasserts Ruhrgas's arguments, the plaintiffs have filed a response to the brief. After considering the parties' submissions, the record in the case, and the relevant law, the Court concludes that Ruhrgas's motion to reconsider the motion to compel arbitration should be denied, Ruhrgas's notion [sic] to dismiss for lack of personal jurisdiction should be granted, this case should be dismissed, and the plaintiffs' motion to remand and Ruhrgas's motion to dismiss for *forum non conveniens* should be denied as moot.

I. Factual Background

The basis of the case is the development of the natural gas, Heimdal Field ("the field"), located in the Norwegian North Sea. The plaintiffs' affiliate, Marathon Petroleum Company (Norway) ("MPCN") entered into an agreement with Ruhrgas to sell its share of the gas from the field to Ruhrgas. The plaintiffs maintain that Ruhrgas and non-party Statoil conspired to have MPCN and the plaintiffs pay for the development of the field and then lock MPCN into the agreement, which was not profitable. The plaintiffs claim that they have suffered losses due to the loans they made to MPCN as a result of Ruhrgas's conduct. The plaintiffs contend that Ruhrgas, by its

actions with non-party Statoil, is liable to the plaintiffs for fraud, tortious interference with prospective business relationships, participation in breach of fiduciary duty, constructive fraud, and civil conspiracy.

II. Arbitration of Claims

It is undisputed that the agreement between MPCN and Ruhrgas contains an arbitration clause. The arbitration clause provides in pertinent part that:

> All claims, disputes and other matters arising out of or relating to this Agreement which the Parties are unable to resolve by mutual agreement . . . shall exclusively and finally be settled by arbitration in Stockholm, Sweden. . . .

Heimdal Gas Sales Agreement at article 15 (Instrument #1, Exhibit B, Exhibit 2 (filed under seal as Instrument #3)). With respect to the instant motion, the main dispute is whether the arbitration clause is binding on the plaintiffs, who admittedly did not sign the agreement.

Ruhrgas contends that this case should be stayed pending arbitration pursuant to sections 1 and 3 of Article II of the Convention on the Recognition and Enforcement of foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, *reprinted in* 9 U.S.C. § 201 note (West Supp. 1995) ("the Convention") and 9 U.S.C. §§ 3 and 208. The Fifth Circuit has held that the Convention contemplates a very limited inquiry by courts when considering a motion to compel arbitration:

> (1) is there an agreement in writing to arbitrate the dispute; in other words, is the arbitration agreement broad or narrow;

> (2) does the agreement provide for arbitration in the territory of a Convention signatory;
>
> (3) does the agreement to arbitrate arise out of a commercial legal relationship; and
>
> (4) is a party to the agreement not an American citizen?

Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co., 767 F.2d 1140, 1144-45 (5th Cir. 1985) (citing *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 185-86 (1st Cir. 1982)). The parties must concede that Sweden is a signatory to the Convention, the dispute arises out of a commercial legal relationship, and Ruhrgas is not an American citizen. The only requirement that is not clearly present is whether there is an agreement in writing to arbitrate the dispute.

Ruhrgas filed its initial Motion for Stay Pending Arbitration (Instrument #6) on August 28, 1995. On November 15, 1995, the Court issued an eleven page Memorandum and Order (Instrument #38) which denied Ruhrgas's motion for stay pending arbitration because it was not established that there was a written agreement whereby the plaintiffs had consented to arbitration with Ruhrgas. Soon after the denial of the motion for stay, Ruhrgas filed a Motion for Reconsideration of Order Denying Motion for Stay Pending Arbitration, or in the Alternative, To Vacate and Defer Ruling Pending Discovery (Instrument #39). In its motion to reconsider, Ruhrgas contends that the plaintiffs should be compelled to arbitration based on the virtual representation doctrine and on the "group of companies" doctrine which has been applied in France.

A. Virtual Representation Doctrine

Ruhrgas maintains that the Fifth Circuit's opinion in *Astron Indus. Assocs., Inc. v. Chrysler Motors Corp.*, 405 F.2d 958 (5th Cir. 1968), requires that this case be stayed pending arbitration. In the Memorandum and Order denying Ruhrgas's initial motion for stay, the Court rejected Ruhrgas's virtual representation argument on the basis that the plaintiffs' claims against Ruhrgas are independent of any contract claims which MPCN might have against Ruhrgas. Instrument #38 at 8-10. The relationships between the companies involved in *Astron* are similar to those in the instant case. Transcontinental Industries, Inc. had a contractual relationship with Chrysler Motors Corporation to provide parts and supplies for Chrysler. Astron Industrial Associates, Inc. acquired Transcontinental relying in large part on Transcontinental's relationship with Chrysler. Astron felt Chrysler had breached the contract with Transcontinental and authorized its legal counsel to initiate two separate lawsuits against Chrysler on behalf of each company, Transcontinental and Astron. Transcontinental ended up in bankruptcy proceedings and eventually had its suit against Chrysler dismissed with prejudice. Chrysler then sought to have the suit by Astron dismissed on the basis of *res judicata*. On appeal, the Fifth Circuit concluded that the Transcontinental and Astron lawsuits were "identical for purposes of *res judicata*. In both suits the only wrong which Chrysler allegedly committed was its failure to supply automobile parts and supplies to Transcontinental." *Astron*, 405 F.2d at 962. "Whether the theory of

recovery be misrepresentation to Transcontinental, misrepresentation to Astron, breach of contract with Transcontinental, or breach of contract with Astron, the operative wrong remains the same, the evidence necessary to sustain the allegations is the same, and a different judgment in this suit would impair rights under the earlier dismissal." *Id.* Since the two lawsuits involved the same wrong by Chrysler and were being pursued by the two related companies, the Fifth Circuit determined that the dismissal of Transcontinental's suit barred Astron from pursuing its suit. *Id.*

Ruhrgas believes that *Astron* applies to the instant case because the plaintiffs' claims allege a wrong which is the same wrong which MPCN could assert against Ruhrgas in arbitration. The Court does not necessarily agree with Ruhrgas's belief that there is only "one wrong" allegedly committed by Ruhrgas. The claims that the plaintiffs have asserted are for alleged acts of misrepresentation by Ruhrgas that induced the plaintiffs to invest money in MPCN. The claims which MPCN could assert against Ruhrgas would deal with whether Ruhrgas breached the contract between them. Assuming, *arguendo* however, that Ruhrgas has committed only one wrong with respect to the plaintiffs and MPCN, Ruhrgas's argument regarding the virtual representation doctrine is that the plaintiffs have so much control over MPCN that the plaintiffs are in privity with MPCN under the virtual representation doctrine.

Ruhrgas has provided evidence which shows that in negotiations and dealings between MPCN and Ruhrgas, MPCN was represented by individuals who were also employees of the plaintiffs. Even if the Court agreed with

Ruhrgas's argument that there is only one wrong and the plaintiffs and MPCN are in privity, Ruhrgas's case for arbitration relies on a footnote in *In re Talbott Big Foot, Inc.*, 887 F.2d 611 (5th Cir. 1989). In *In re Talbott*, the Fifth Circuit noted that whether a nonsignatory to an arbitration agreement could be compelled to arbitrate would be a closer question if the nonsignatory and signatory were in privity so that an arbitration award would have a preclusive effect against the nonsignatory. *Id.* at 614 n.4. However, *In re Talbott* involved a situation of whether a nonsignatory's action should be stayed pending the resolution of a related arbitration which might have a preclusive effect on the litigation. Thus, even *In re Talbott* does not necessarily apply in this case because MPCN has not initiated arbitration proceedings against Ruhrgas.

This situation may certainly be discouraging to Ruhrgas since the plaintiffs and MPCN might very likely have made a conscious decision that MPCN would not pursue any claims against Ruhrgas, but there would be nothing improper about the plaintiffs doing so. The virtual representation doctrine has no application to this case and the plaintiffs are not bound by MPCN's arbitration clause on that basis.

B. Group of Companies Doctrine

Ruhrgas next argues that the plaintiffs should be bound by the arbitration clause to which MPCN agreed to based on the "group of companies" theory. This theory comes from *Dow Chemical v. Isover Saint Gobain*, Cour d'

Appel, Paris, 21 October 1983, 110 J. 899 (1983) IX Yearbook 131 (1984) (English translation) (a copy of the opinion is attached to Instrument #39 as Exhibit 1 to Exhibit A), an opinion by a French arbitration panel. In *Dow Chemical*, two Dow subsidiaries had agreements with Isover which provided for arbitration. The issue resolved in *Dow Chemical* was whether the parent company, Dow Chemical (USA) and another subsidiary, Dow Chemical France, could also require that their claims against Isover be arbitrated as well. The French panel concluded that, in view of the major roles that Dow Chemical (USA) and Dow Chemical France played in executing the agreements with Isover, the arbitration agreement could be enforced by them. The panel stated that, "Considering that irrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality . . . of which the arbitral tribunal should take account when it rules on its own jurisdiction. . . . " *Id.* at 136. Ruhrgas urges this Court to adopt the group of companies doctrine from *Dow Chemical* and hold that the plaintiffs in the instant case are bound by the arbitration clause executed by MPCN.

Obviously, the *Dow Chemical* opinion has no binding precedential value on this Court. Additionally, *Dow Chemical* does not squarely apply to this case. The French panel went on to state that, "Considering, in particular, that the arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and **in accordance with the mutual intention of all parties to the proceedings,** appear to

have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise." *Id.* (emphasis added). In the instant case, although the plaintiffs may have played a significant role in the negotiations of the contract between Ruhrgas and MPCN, it is certainly not clear that all the parties (the plaintiffs, MPCN, and Ruhrgas) intended to be bound by the arbitration clause between MPCN and Ruhrgas. Another important distinction between *Dow Chemical* and the instant case is that Dow Chemical (USA) and Dow Chemical France were trying to compel arbitration with a party which had agreed to arbitration with at least some related entity. In the instant case, however, Ruhrgas seeks to compel arbitration with the plaintiffs even though they have never consented to arbitration with Ruhrgas or any member of its group.

The Court declines to find that the plaintiffs should be compelled to arbitrate their claims with Ruhrgas based on the group of companies doctrine. Having rejected Ruhrgas's arguments in its motion for reconsideration of its motion for stay, the Court concludes that its denial of Ruhrgas's motion for stay pending arbitration was proper and the motion for reconsideration should be denied.

III. Discretion to Rule on Pending Jurisdictional Motions

In the Scheduling Conference held before United States Magistrate Judge Frances H. Stacy on November 6, 1995, each side of this case argued that the Court should rule on its respective jurisdictional motions without ruling on the motions of the other. In other words, the

plaintiffs desired to have the Court grant their motion to remand without ruling on Ruhrgas's motions to dismiss. Ruhrgas, on the other hand, desired to have the Court rule on the arbitration issue and/or the motions to dismiss for lack of personal jurisdiction and *forum non conveniens* before ruling on the motion to remand. At this point, the Court is faced with choosing first to rule on the plaintiffs' motion to remand, Ruhrgas's motion to dismiss for lack of personal jurisdiction, or Ruhrgas's motion to dismiss for *forum non conveniens.*

In the Fifth Circuit, the law is well settled that district courts have the power to rule on motions challenging personal jurisdiction before reaching motions to remand. *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489, 1494 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 690 (1994). Judicial economy is served by the exercise of this power because if the district court remands the case, it has merely avoided ruling on a motion that will fall to the state court to decide. *Id.* Furthermore, it is often necessary for district to address the issue of personal jurisdiction regardless of which motion it addresses first. *Id.* The Court will first discuss Ruhrgas's motion to dismiss for lack of personal jurisdiction because the conclusion that personal jurisdiction does not exist over Ruhrgas is dispositive of the remaining motions and the case.

IV. Motion to Dismiss for Lack of Personal Jurisdiction

Pursuant to Fed. R. Civ. P. 12(b)(2), Ruhrgas moves to have the claims against it dismissed. When a defendant challenges personal jurisdiction, the plaintiffs have the

burden to prove that the Court has jurisdiction over the defendant. *Colwell Realty Invs., Inc. v. Triple T. Inns of Arizona, Inc.*, 785 F.2d 1330, 1332 (5th Cir. 1986). The plaintiffs must establish by *prima facie* evidence that personal jurisdiction exists over Ruhrgas. *Union Carbide Corp. v. UGI Corp.*, 731 F.2d 1186, 1189 (5th Cir. 1984). The Court may exercise personal jurisdiction over a non-resident defendant only if (1) the defendant is subject to service of process under the forum state's long-arm statute and (2) the exercise of jurisdiction comports with the due process requirements of the Fourteenth Amendment. *Colwell Realty*, 785 F.2d at 1333. Because the Texas long-arm statute, Tex. Civ. Prac. & Rem. Code § 17.042, "reaches as far as the federal constitutional requirements of due process will permit," the Court need only determine whether the exercise of personal jurisdiction over Ruhrgas satisfies the United States Constitution's due process requirements. *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 200 (Tex. 1985).

The due process clause of the Fourteenth Amendment, as interpreted by the Supreme Court, permits the exercise of personal jurisdiction over a nonresident defendant when (1) that defendant has established "minimum contacts" with the forum state; and (2) the exercise of jurisdiction over that defendant does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

The minimum contacts prong of the test may give rise to either "specific" or "general" jurisdiction. *WNS, Inc. v. Farrow*, 884 F.2d 200, 202 (5th Cir. 1989). When the act or transaction being sued upon is unrelated to the nonresident defendant's contacts with the forum state,

personal jurisdiction does not exist unless the defendant has sufficient "continuous and systematic contacts" with the forum state to support "general jurisdiction," but a single act by a nonresident defendant directed at the forum state can be enough to confer personal jurisdiction by "specific jurisdiction" if that act gives rise to the claim being asserted. *Ham v. La Cienega Music Co.*, 4 F.3d 413, 415-16 (5th Cir. 1993) (citing *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984)).

The minimum contacts prong, for specific jurisdiction purposes, is satisfied by actions, or merely a single act, by which the nonresident defendant "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). Specific jurisdiction exists over a nonresident defendant only if the nonresident defendant: (1) purposefully directed his activities at the residents of the forum state, *Asahi Metal Ind. Co. v. Superior Court of Cal.*, 480 U.S. 102, 109-22 (1987), and (2) the plaintiff's claims arise out of or relate to the defendant's purposeful contact with the forum. *Burger King*, 471 U.S. at 472. The nonresident's "purposeful availment" must be such that the defendant "should reasonably anticipate being haled into court" in the forum state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

But even if minimum contacts exist, the exercise of personal jurisdiction over a nonresident defendant will fail to satisfy due process requirements if the assertion of jurisdiction offends "traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316. In determining this fundamental fairness issue, courts are to

examine (1) the defendant's burden; (2) the forum state's interest; (3) the plaintiffs' interest in convenient and effective relief; (4) the judicial system's interest in effective resolution of controversies; and (5) the state's shared interests in furthering fundamental social policies. *Asahi Metal,* 480 U.S. at 112.

In this case, the plaintiffs contend that Ruhrgas is subject to both specific jurisdiction and general jurisdiction. Expectedly, Ruhrgas argues that it is not subject to personal jurisdiction on either basis. The Court will consider each basis of personal jurisdiction *seriatim.*

A. Specific Jurisdiction

For the exercise of specific jurisdiction over a nonresident defendant to be proper, the nonresident defendant must have purposefully availed itself of the privilege of conducting activities within Texas, thus invoking the benefits and protections of its laws. *Holt Oil & Gas Corp. v. Harvey,* 801 F.2d 773, 777 (5th Cir. 1986), *cert. denied,* 481 U.S. 1015 (1987). As stated above, specific jurisdiction exists over a nonresident defendant only if the nonresident defendant: (1) purposefully directed his activities at the residents of the forum state, *Asahi Metal,* 480 U.S. at 109-22, and (2) the plaintiff's claims arise out of or are directly related to the defendant's purposeful contact with the forum. *Wilson v. Belin,* 20 F.3d 644, 647 (5th Cir.), *cert. denied,* ___ U.S. ___, 115 S.Ct. 322 (1994) (citing *Helicopteros,* 466 U.S. at 414 n.8). The plaintiffs have failed to satisfy either of the prerequisites for the exercise specific jurisdiction over Ruhrgas.

The plaintiffs maintain that Ruhrgas is subject to specific jurisdiction in Texas due to Ruhrgas's attendance at three meetings in Houston concerning the Heimdal Field. The meetings occurred in February 1987, November 1989, and April 1990. Each of these meetings concerned the sales contract between Ruhrgas and MPCN. Bossley Deposition (Instrument #65, Exhibit 2) at 45, 48-49, 52-53, 58-60. The plaintiffs' claims concern misrepresentations and fraudulent conduct by Ruhrgas and Statoil which caused the plaintiffs to suffer losses by continuing to supply funds to MPCN. The plaintiffs' designated representative who attended all three of the Houston meetings, Mr. Burton Bossley, was unable to recall any discussion at the Houston meetings concerning the funding arrangement between the plaintiff's and MPCN. Bossley Deposition (Instrument #65, Exhibit 2) at 62-64. There is no evidence that Ruhrgas's alleged tortious conduct was aimed at Texas or that the brunt of any injury would be felt in Texas. Mr. Bossley was not even able to recall any false statements made by Ruhrgas at the Houston meetings. Bossley Deposition (Instrument #65, Exhibit 2) at 61-62.

The Court is to examine the relationship between Ruhrgas, the forum, and the litigation to determine whether jurisdiction is appropriate. *Southmark Corp. v. Life Investors, Inc.,* 851 F.2d 763, 772 (5th Cir. 1988) (citing *Holt Oil & Gas,* 801 F.2d at 777)). In view of the nature of the plaintiffs' claims and Ruhrgas's contact with Texas, the Court concludes that the exercise of specific jurisdiction over Ruhrgas would not be proper. *Southmark Corp.,* 851 F.2d at 772. Additionally, Ruhrgas's presence in Texas was related to negotiations under the contract between

Ruhrgas and MPCN. Since the contract between Ruhrgas and MPCN provided for arbitration in Sweden, Ruhrgas could not have expected to be haled into Texas courts based on these meetings. The Court is aware that the personnel for MPCN who attended the meetings in Houston with Ruhrgas wore "several hats" (*i.e.*, the same individuals who represented MPCN also represented other Marathon entities at the same time), and Ruhrgas was possibly aware of the situation. Since there is no evidence that Ruhrgas engaged in any tortious conduct in Texas, however, Ruhrgas is not subject to specific jurisdiction based on MPCN's representatives wearing other entities' hats because Ruhrgas was in Houston due to the contract with MPCN and could only expect to have to engage in arbitration in Sweden.

B. General Jurisdiction

For a court to exercise general jurisdiction over a nonresident defendant, the defendant must have contacts with the forum state which are continuous, systematic, and substantial. *Wilson*, 20 F.3d at 649 (citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 n.11 (1984). Perkins is the only case in which the Supreme Court has upheld the finding of general jurisdiction. *Amoco Egypt Oil Co. v. Leonis Navigation Co., Inc.*, 1 F.3d 848, 851 n.3 (9th Cir. 1993). "The leading Supreme Court case on general jurisdiction is *Helicopteros*. . . . " *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 181 (5th Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993). In order to determine whether Ruhrgas's contacts constitute the kind of continuous and systematic general business contacts to support

general jurisdiction, the Court must explore the nature of Ruhrgas's contacts with Texas. *Helicopteros*, 466 U.S. at 415-16.

The plaintiffs contend that Ruhrgas is subject to general jurisdiction based on the following contacts with Texas. In 1994, Ruhrgas acquired a twenty percent share of Houston based Tenneco Energy Resources Corporation ("TERC") for $47 million. Instrument #63, Exhibit 11. The purchase of the TERC stock was negotiated in Houston. Benke Deposition (Instrument #63, Exhibit 12) at 41. Ruhrgas has one member on the five member board of directors of TERC. *Id.* at 7. The Ruhrgas board member and two other Ruhrgas officials travel to Houston three times each year for TERC's board meetings. Benke Affidavit (Instrument #5, Exhibit D) These individuals from Ruhrgas also attend about nine other meetings per year in Houston in relation to TERC which appear to have occurred on combined trips. Instrument #63, Exhibit 12 at 15, 65-67, 69-70. Ruhrgas personnel have possibly traveled to Texas for meetings with various US oil companies. *Id.* at 77-78. Ruhrgas maintains an employee training program with TERC wherein young low-level Ruhrgas employees are temporarily assigned to work in Houston for TERC under TERC's direction. Falkenhausen Deposition (Instrument #63, Exhibit 21). These employees are generally paid by TERC, unless the assignment to TERC is for less than a year, in which case Ruhrgas continues to pay them. *Id.* at 19. While the employees are assigned to TERC, Ruhrgas pays them overseas bonuses and salary differentials, subsidizes Houston housing expenses, and subsidizes the employees' children's educational

expenses in Houston. Id. at 15, 19, 20, 21, 26. The plaintiffs also point out that while the Ruhrgas employees are assigned to TERC, they are considered to simultaneously be employees of Ruhrgas. Instrument #63, Exhibit 25. The plaintiffs have provided a summary of Ruhrgas's purchase orders from April 1983 through October 1995 which reveal about one million dollars in purchases in Texas during the last twelve years. Instrument #63, Exhibit 26. Additionally, it appears that Ruhrgas has paid over $700,000 to a Dallas based firm for reservoir evaluation services over the last twenty years. Instrument #63, Exhibit 27. Based on these contacts with Texas, the plaintiffs maintain that Ruhrgas has systematic and continuous contacts with Texas that will support general jurisdiction over Ruhrgas.

With respect to Ruhrgas's stock ownership of TERC and its participation in TERC related activities, it is settled that even complete stock ownership and common officers and directors are not sufficient to attribute the contacts of one entity to another. *Dunn v. A/S Em. Z Svitzer*, 885 F.Supp. 980, 987 (S.D.Tex. 1995) (citing *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1160 (5th Cir. 1987)). Therefore, Ruhrgas's ownership interest in TERC is not a factor in determining continuous and systematic contacts in Texas. With respect to Ruhrgas's employees that are assigned to TERC, the Fourth Circuit in *Ratliff v. Cooper Lab., Inc.*, 444 F.2d 745 (4th Cir.), *cert. denied*, 404 U.S. 948 (1971), held that general jurisdiction did not exist over a nonresident defendant in spite of the defendant having five salesmen living in the forum state who promoted the defendant's products to customers in the forum state. In the instant case, the Ruhrgas employees

that are assigned to work in Houston are not doing work for Ruhrgas. They are working for TERC on TERC projects. The Court concludes that the presence of the Ruhrgas employees in Houston provides an even less compelling basis to support general jurisdiction over Ruhrgas than did the salesmen in *Ratliff*.

The remaining contacts that Ruhrgas has with Texas (*i.e.*, training sessions and purchases in Texas) do not support general jurisdiction based on *Helicopteros*. Similar contacts with Texas were found to be insufficient to support general jurisdiction in *Helicopteros*. *Helicopteros* was a wrongful death case brought in Texas state court against Helicopteros, a Colombian corporation, after a helicopter crash in Peru. The Supreme Court held that Helicopteros was not subject to general jurisdiction in Texas in spite of (1) its CEO having attended a meeting in Texas; (2) its having accepted checks drawn on a Texas bank; (3) its employees attending training sessions in Texas; and (4) its having made four million dollars in purchases from a Texas business during a seven year period. Ruhrgas's attending meetings in Texas and purchasing less than two million dollars in products and services from Texas businesses falls short of the level of contacts that Helicopteros had with Texas which the Supreme Court held were insufficient to establish general jurisdiction. Therefore, Ruhrgas has not had systematic and continuous contacts with Texas which subject it to general jurisdiction in Texas.

Because the Court has concluded that there is no general or specific jurisdiction over Ruhrgas, the Court need not consider whether the exercise of jurisdiction

over Ruhrgas would comport with traditional notions of fair play and substantial justice.

V. Conclusion

In accordance with the foregoing, the Court hereby

ORDERS that Ruhrgas's Motion for Reconsideration of Order Denying Motion for Stay Pending Arbitration, or in the Alternative, To Vacate and Defer Ruling Pending Discovery (Instrument #39) is **DENIED**; and

ORDERS that Ruhrgas's Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(2) (Instrument #4) for lack of personal jurisdiction is **GRANTED**.

The Court further

ORDERS that the plaintiffs' Motion to Remand (Instrument #12) and Ruhrgas's Motion to Dismiss on *Forum Non Conveniens* Grounds (Instrument #8) are **DENIED** as **moot**.

SIGNED at Houston, Texas, this 29th day of March 1996.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, AND MARATHON PETROLEUM NORGE A/S,	)	
Plaintiffs,	)	CIVIL ACTION
vs.	)	NO. H-95-4176
RUHRGAS, A.G.,	)	
Defendant.	)	

ORDER OF DISMISSAL

(Filed Mar. 29, 1996)

In accordance with the Court's Memorandum and Order of this day granting defendant Ruhrgas, A.G.'s motion to dismiss for lack of personal jurisdiction, the Court hereby

ORDERS that this case be **DISMISSED** for lack of personal jurisdiction over defendant Ruhrgas, A.G.; and

ORDERS that Ruhrgas, A.G. shall recover its costs of court.

SIGNED at Houston, Texas, this 29th day of March 1996.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, and MARATHON PETROLEUM NORGE A/S,	§	
Plaintiffs,	§	**CIVIL ACTION**
v.	§	**NO. H-95-4176**
RUHRGAS, A.G.,	§	
Defendant.	§	

NOTICE OF APPEAL

Plaintiffs Marathon Oil Company, Marathon International Oil Company and Marathon Petroleum Company Norge A/S hereby give notice of their appeal to the United States Court of Appeals for the Fifth Circuit of this Court's Order of Dismissal of March 29, 1996, and its Memorandum and Order entered the same date.

DATED this 4th day of April, 1996.

Respectfully submitted,

/s/ Clifton T. Hutchinson
Clifton T. Hutchinson
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CERTIFICATE OF SERVICE

A copy of this document was served on Defendant's attorneys of record in accordance with Federal Rule of Civil Procedure 5, on April 4, 1995.

/s/ David J. Schenck
David J. Schenck

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20361

MARATHON OIL COMPANY; MARATHON INTERNATIONAL OIL COMPANY; MARATHON PETROLEUM NORGE A/S,

Plaintiffs-Appellants
Cross-Appellees,

versus

RUHRGAS, A.G.

Defendant-Appellee
Cross-Appellant.

Appeal from the United States District Court
For the Southern District of Texas

(Filed Jun. 10, 1997)

Before POLITZ, Chief Judge, WEINER and STEWART, Circuit Judges.

POLITZ, Chief Judge:

This international commercial dispute involves allegations of fraud, civil conspiracy, and various business torts. Concluding that the district court lacked subject matter jurisdiction, we vacate and remand with instructions.

Background

In 1976 Marathon Oil Company (MOC) became involved in North Sea gas exploration activities when its affiliate, Marathon International Oil (MIO), purchased a European concern holding a North Sea production license.[1] The production license, originally held by Marathon Petroleum Norge (Norge), ultimately gave another affiliate, Marathon Petroleum Norway (MPN), rights to 24% of a gas field in the North Sea known as the Heimdal field.[2] Another large interest holder in the Heimdal field was Statoil, Norway's state-owned gas company, which had purchased a 40% interest in 1975.

The present litigation arises from alleged oral and written agreements between the Marathon companies, Ruhras, A.G., and other European companies regarding the development and production of Heimdal field reserves. Ruhrgas is Germany's primary gas company. According to the Marathon plaintiffs, Ruhrgas, Statoil, and a consortium of other European companies secretly conspired to monopolize the western European gas market by funneling a large portion of North Sea gas reserves through Ruhrgas's production facilities in Germany.

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[1] MIO acquired Pan Ocean and its subsidiary, Pan Ocean Norge, which held the North Sea production license. Pan Ocean was later renamed Marathon Petroleum Norway, and Pan Ocean Norge became Marathon Petroleum Norge.

[2] MPN acquired the production license by virtue of a Pass Through Agreement with its subsidiary, Marathon Petroleum Norge, the original license holder.

The plaintiffs allege that to effectuate this plan Ruhrgas duped them into providing MPN with $300 million to participate in extensive construction and drilling operations with the false promises of premium prices for MPN's European gas sales and guaranteed pipeline transportation tariffs to help offset the substantial construction investment.[3]

When it ultimately became apparent that premium prices would not be honored and the scheduled transportation tariffs would not materialize, MOC, MIO, and Norge[4] sued Ruhrgas in Texas state court for fraud, misrepresentation, civil conspiracy, and tortious interference with business relations. Ruhrgas timely removed, invoking jurisdiction under diversity of citizenship, federal question, and 9 U.S.C. § 205. After removal, Ruhrgas moved for a stay pending arbitration in Europe which the district court denied. Ruhrgas then filed a motion to dismiss for lack of personal jurisdiction and a motion to dismiss for *forum non conveniens*. The Marathon plaintiffs moved to remand for lack of subject matter jurisdiction. The district court granted Ruhrgas's motion to dismiss for lack of personal jurisdiction and dismissed all other

[3] This proposal was known as the "Heimdal Gas Agreement," which allegedly guaranteed a $5.50 per million BTU price. MPN, as assignee of Norge's Heimdal license, was a party to this agreement.

[4] As a signatory to the Heimdal Gas Agreement, MPN's claims were subject to binding arbitration in Europe. Norge, however, was not a signatory and asserts that although it assigned its Heimdal License to MPN, it nonetheless has standing to sue for the alleged devaluation of the license. We address that contention *infra*.

motions as moot. The court then denied Ruhrgas's motion for reconsideration in which Ruhrgas reurged the court to abate all proceedings pending compelled arbitration in Europe. All parties timely appealed.

Analysis

We address at the threshold the vital question of federal subject matter jurisdiction. As courts of limited jurisdiction, federal courts may adjudicate a case or controversy only if there is both constitutional and statutory authority for federal jurisdiction.[5] Ruhrgas insists that we must rule on its personal jurisdiction challenge without first determining whether we have jurisdiction *ratione materiae*. We are cognizant that in some instances we have permitted the dismissal of an action for lack of personal jurisdiction without considering the question of subject matter jurisdiction.[6]

We decline, however, to extend those cases into mandatory rules of trial and appellate procedure governing the order in which jurisdictional motions must be determined. No dispositive precedent of our circuit has held

[5] *Kokkonen v. Guardian Life Ins. Co. of America*, 51 U.S. 375 (1994); *B, Inc. v. Miller Brewing Co.*, 663 F.2d 545 (Former 5th Cir. 1981); Erwin Chemerinski, *Federal Jurisdiction* 217 (1989); *see also Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850) (Congress may create lower federal courts and thus has the power to vest them with less than full Article III jurisdiction).

[6] *See, e.g., Villar v. Crowley Maritime Corp.*, 990 F.2d 1489 (5th Cir. 1993); *Asociacion Nacional de Pescadores v. Dow Quimica*, 988 F.2d 559 (5th Cir. 1993); *Walker v. Savell*, 335 F.2d 536 (5th Cir. 1964).

that a court *must* ignore a lack of subject matter jurisdiction when it has before it an easier disposition of a motion to dismiss for lack of personal jurisdiction. Such a rule necessarily would be invalid in light of our constitutional and statutory authority and the overwhelming body of precedent commanding all federal courts to scrutinize assiduously subject matter jurisdiction at each stage of litigation, trial and appellate, and to dismiss cases not properly before us.[7]

We must be ever mindful that any rule or decision allowing a federal court to act without subject matter jurisdiction conflicts irreconcilably with basic principles of federal court authority.[8] On several occasions we have sounded the caution that "[w]here a federal court proceeds in a matter without first establishing that the dispute is within the province of controversies assigned to it by the Constitution and statute, the federal tribunal

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[7] *See, e.g., Cutler v. Rae*, 7 U.S. (7 How.) 729 (1849); *Mansfield v. Swan*, 111 U.S. 379 (1884); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908); *Mitchell v. Maurer*, 293 U.S. 237 (1934); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939); *Philbrook v. Glodgett*, 421 U.S. 7078 (1975); *Judice v. Vall*, 430 U.S. 327 (1977); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1986); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); *Save the Bay, Inc. v. United States Army*, 639 F.2d 1100 (5th Cir. 1981); *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295 (5th Cir. 1985); *Mocklin v. Orleans Levee Dist.*, 877 F.2d 427 (5th Cir. 1989); *Trizec Properties, Inc. v. United States Mineral Prods. Co.*, 974 F.2d 602 (5th Cir. 1992); *Moore v. United States Dept. of Agriculture ex rel. Farmers Home Admin.*, 55 F.3d 991 (5th Cir. 1995).

[8] *See, e.g., Kokkonen*, 511 U.S. at 377 (holding that the jurisdiction of the federal courts "is not to be expanded by judicial decree") (*citing American Fire & Cas. Co. v. Finn*, 431 U.S. 6 (1951)).

poaches upon the territory of a coordinate judicial system, and its decisions, opinions, and orders are of no effect."[9] If dismissals for lack of personal jurisdiction were judgments on the merits, decisions allowing that determination in the absence of federal subject matter jurisdiction would have no validity.[10] The appropriate course is to examine for subject matter jurisdiction constantly and, if it is found lacking, to remand to state court if appropriate, or otherwise dismiss.[11] Such a course respects the proper balance of federalism. We must, therefore, reject Ruhrgas's invitation to ignore the formidable subject matter jurisdiction issue presented herein and resolve that fundamental issue.

Given the limited nature of federal jurisdiction, there is a strong presumption against same,[12] and "the burden

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[9] *B, Inc.* 663 F.2d at 548; *see also Stafford v. Mobile Oil Corp.*, 945 F.2d 803 (5th Cir. 1991); *Getty Oil Co. v. Insurance Co. of N. Am.*, 841 F.2d 1254 (5th Cir. 1988); *In re Majestic Energy Corp.*, 835 F.2d 87 (5th Cir. 1988); *In re Carter*, 618 F.2d 1093 (5th Cir. 1980).

[10] *See Caterpillar, Inc. v. Lewis*, 117 S.Ct. 467 (1996) (holding that a district court must have subject matter jurisdiction by the time it renders judgment for the judgment to be valid); *see also Weeks v. Fidelity & Cas. Co.*, 218 F.2d 503, 504 (5th Cir. 1955) ("If the refusal to remand was erroneous, the judgment of dismissal was likewise erroneous.") (citing *Ruff v. Gay*, 67 F.2d 684 (5th Cir. 1933), *aff'd.* 292 U.S. 25 (1934)).

[11] Confronted with virtually identical facts, in *Ziegler v. Champion Mortgage Co.*, 913 F.2d 220 (5th Cir. 1990), we raised the subject matter jurisdiction question *sua sponte* and vacated the judgment of dismissal which was based on a lack of personal jurisdiction.

[12] *Cf. Leffal v. Dallas Indep. School Dist.*, 28 F.3d 521, 524 (5th Cir. 1994) ("Removal statutes are to be strictly construed against removal.").

of establishing the contrary rests upon the party asserting jurisdiction."[13] Ruhrgas, as the removing party, has advanced several theories in support of federal jurisdiction. We address each in turn.

A. Diversity of Citizenship

MOC is an Ohio corporation with its principal place of business in Houston, Texas. MIO is a Delaware corporation with its principal place of business in Houston, Texas. Norge is an alien corporation headquartered in Norway. The defendant, Ruhrgas, A.G., is an alien corporation headquartered in Germany.

Norge's status as an alien corporation defeats diversity jurisdiction,[14] unless, as Ruhrgas contends. Norge was fraudulently joined for that very purpose. Among other complaints,[15] Norge contends that Ruhrgas's

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[13] *Kokkonen*, 511 U.S. at 377; *see also Stafford v. Mobil Oil Corp.*, 945 F.2d 803, 804 (5th Cir. 1991) ("The burden of proving that complete diversity exists rests upon the party who seeks to invoke the court's diversity jurisdiction.").

[14] *See Giannakos*, 762 F.2d at 1298 (holding that "[d]iversity does not exist where aliens are on both sides of the litigation").

[15] At the time the parties filed their appellate briefs, Norge did not have the right to market Heimdal gas under the Pass Through Agreement. Briefing indicated that MPN's rights under the Pass Through Agreement would terminate if it failed to perform certain obligations. Norge predicted that such a reversion would occur as a result of Ruhrgas's activities during the summer of 1996. The current status of the Pass Through Agreement therefore is unclear. Terms in the agreement, however, indicate that Norge may have continuing obligations to the nation of Norway under the original production license

monopolization of the western European gas market completely prevents both MPN and itself from marketing Heimdal gas reserves to non-consortium buyers and thereby devalues the production license. Ruhrgas responds that Norge cannot complain of any damage to its production license as Norge assigned all of its interests in the Heimdal license to MPN.

The party attempting to prove fraudulent joinder has a heavy burden.[16] To establish that a defendant has been joined fraudulently, "the removing party must show [by clear and convincing evidence] either that there is *no possibility* that the plaintiff would be able to establish a cause of action against the [nondiverse] defendant in state court; or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts."[17] in making this determination, a court must resolve "all disputed questions of fact and all ambiguities in the controlling law in favor of the non-removing party."[18]

A close reading of the record and the extensive briefing on fraudulent joinder leave us unconvinced that Norge has been joined fraudulently to defeat diversity jurisdiction. It is not clear what interest Norge possessed

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and that Ruhrgas's interference in MPN's activities may be impacting those obligations. Norge also asserts that Ruhrgas has tortiously interfered with MPN's obligations to Norge under the Pass Through Agreement.

[16] *Ford v. Elsbury*, 32 F.3d 931 (5th Cir. 1994).

[17] *B, Inc.*, 663 F.2d at 549 (Footnote omitted).

[18] *Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir. 1992); *see also Burden v. General Dynamics Corp.*, 60 F.3d 213 (5th Cir. 1995); *B, Inc.*

when granted the production license, nor can we determine with certainty from the record and briefings what interest *vel non* Norge retains after the Pass Through Agreement. Although Norge maintains that it holds legal title to all unproduced reserves, it is apparent that several other possibilities exist for classifying Norge's property interest. Given Texas's choice of law rules Norwegian law likely would have to be consulted to answer these difficult questions.[19] At this stage in the proceedings, however, Ruhrgas shoulders the burden of proof, and it simply cannot prove, by clear and convincing evidence, that Norge has absolutely no possibility of recovering damages under any theory of liability. Diversity jurisdiction, therefore, is not present.

B. Federal Question Jurisdiction

Ruhrgas asserts that federal question jurisdiction is present because the "[p]laintiffs' claims raise substantial

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[19] *See Cantu v. Bennett*, 39 Tex. 304 (1873) (indicating that the law of the situs would control the characterization of Norge's property interests); *but see Swanson v. Schlomberger Tech. Corp.* (Tex.App. – Texarkana 1995, writ granted) (indicating that Texas law may control this determination under the "most significant relationship" test). Given the fraudulent joinder standards, we must presume that Norwegian law would apply. Burden. There is, however, no evidence of Norwegian law in the record. Even if we were to attempt to apply Texas law, classification of these various interests and the concomitant rights of Norge to pursue damage remedies would be unclear. This alone precludes a finding of fraudulent joinder. *See Sid Richardson Carbon & Gasoline Co. v. Interenergy Res., Ltd.*, 99 F.3d 746 (5th Cir. 1996).

questions of foreign and international relations and questions of customary international law and act-of-state questions which are incorporated into and form a part of the federal common law." The Marathon plaintiffs note that they have alleged only state law causes of action and contend that the well-pleaded complaint rule bars a finding of federal question jurisdiction.

In *Torres v. Southern Peru Copper Corp.*,[20] we found federal question jurisdiction based on the federal common law of foreign relations. As in *Torres*, the defendant's government, the Republic of Germany, has filed a letter of protest with the State Department and an amicus brief with the court. The similarities between the two cases end there. Our holding in *Torres* is a very specific application of the well-pleaded complaint rule, under which the complaint must state a cause of action necessarily requiring the "resolution of a substantial question of federal law."[21] That test was met in *Torres* because the suit itself struck directly at vital economic interests of the nation, and, in deed, at the very sovereignty of the Republic of Peru.

The same cannot be said herein for the Republic of Germany. Its amicus brief focuses primarily on two areas: the enforceability and breadth of European arbitration clauses, and the impact on international trade from allowing suits against European companies to proceed in United States courts. Such concerns, through not insubstantial, would describe many international commercial

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[20] No. 96-40203, 1997 WL 259649 (5th Cir. May 19, 1997).

[21] *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13 (1983).

disputes between western European corporations and United States corporations and cannot properly form the basis of federal subject matter jurisdiction.

Ruhrgas appears to be an important gas supplier in Germany and western Europe but this action does not strike at the sovereignty of a foreign nation. The plaintiffs' claims do not call into question official German policy decisions and the Republic of Germany was not a participant in the activities giving rise to this suit. This litigation does not seek to impose liability for injuries to foreign citizens occurring solely on foreign soil, as was the situation in Torres. Indeed, Ruhrgas allegedly came to the United States and defrauded a United States company on American soil. Merely requiring a German corporation to abide by state law when present here does not *necessarily* implicate substantial foreign relations issues between the United States and Germany. Further, we remain unconvinced that this suit may impact severely the vital economic interests of a highly developed and flourishing industrial nation such as Germany. Federal question jurisdiction does not exist.

C. 9 U.S.C. § 305

Finally, Ruhrgas claims that this case is removable under 9 U.S.C. § 205 because the plaintiff's claims relate to an arbitration agreement falling under the Convention on the Recognition and Enforcement of Foreign Arbitral

Awards. Notably, MOC, MIO, and Norge were not signatories to any arbitration agreement, nor were they parties to any arbitration proceedings.[22]

Under 9 U.S.C. § 205, federal jurisdiction exists if the plaintiffs' claims relate to an arbitration agreement or award falling under the Convention on the Recognition of Foreign Arbitral Awards. An arbitration agreement or award falling under the Convention is one which arises out of an international commercial legal relationship.[23] No one disputes that the plaintiffs' claims arise from international commercial relationships; the issue is whether any *relevant* arbitration agreement exists between the parties to this litigation, a necessary predicate for federal jurisdiction under 9 U.S.C. § 205.[24] Simply stated, there is no such agreement.[25]

Ruhrgas maintains that the Marathon plaintiffs are attempting to enforce provisions of the Heimdal Gas Agreement, an agreement to which they are not parties. It further characterizes this suit as an inappropriate attempt

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[22] MPN, however, has participated successfully in arbitration proceedings in Europe.

[23] *See* 9 U.S.C. §§ 205.2.

[24] *See Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Corp.*, 767 F.2d 1140 (5th Cir. 1995) (holding that the Convention only applies where (1) there is an agreement in writing to arbitrate the dispute; (2) the agreement provides for arbitration in the territory of a convention signatory; (3) the agreement to arbitrate arises from a commercial legal relationship; and (4) a non-American citizen is a party to the agreement).

[25] Ruhrgas acknowledges that none of the Marathon plaintiffs have any contractual relationship with Ruhrgas and that none of the plaintiffs ever signed an arbitration agreement.

to circumvent the arbitration agreement under which MPN is bound to arbitrate any disputes concerning the Heimdal Gas Agreement. As such, Ruhrgas contends that the Marathon plaintiffs should be estopped from denying the applicability of the arbitration provisions. We are not persuaded.

MOC and MIO are not seeking redress for wrongs done to MPN. Rather, they allege that Ruhrgas and others jointly participated in a scheme to induce them fraudulently into investing $300 million into MPN. That Ruhrgas may have effectuated this fraud through its contractual relationship with MPN does not lead to the conclusion that MOC and MIO are seeking damages for harm done to MPN. Further, MOC and MIO are not seeking damages for any breach of contract; they could not do so because no contracts exist between them and Ruhrgas.[26] The same is true of Norge's claims. Norge merely claims that Ruhrgas's tortuous conduct has affected the value of its production license and impeded its obligations and rights under the Heimdal license and Pass Through Agreement. Norge is not seeking damages on behalf of MPN, nor has it claimed entitlement to any rights under the Heimdal Gas Agreement.

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[26] Contrary to Ruhrgas's contention that the Marathon plaintiffs are seeking to enforce the pricing arrangements in the Heimdal Gas Agreement, plaintiffs do no seek injunctive relief. Moreover, the plaintiffs would not be entitled to recover the lost profits of MPN, though such figures may be relative in proving the extent of the plaintiffs' damages.

Finally, Ruhrgas asserts other theories for its thesis that the arbitration provisions in the Heimdal Gas Agreement should apply to all of MPN's corporate affiliates. None is persuasive.

Conclusion

Concluding that the district court lacked subject matter jurisdiction, we vacate the judgment of the district court and remand with instructions that this action be remanded to the 152nd Judicial District Court of Harris County, Texas.

VACATED and REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20361

MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, MARATHON PETROLEUM NORGE A/S,

Plaintiffs-Appellants-Cross-Appellees,

versus

A G RUHRGAS,

Defendant-Appellee-Cross-Appellant.

Appeals from the United States District Court
for the Southern District of Texas

(Opinion June 10, 1997, 5 Cir., 1997, ___ F.3d ___)

(Filed Nov. 17, 1997)

Before POLITZ, Chief Judge, KING, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHE, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, PARKER and DENNIS, Circuit Judges.

BY THE COURT:

A majority of judges in active service having determined, on the Court's own motion, to rehear this case en banc,

IT IS ORDERED that this cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20361

MARATHON OIL COMPANY,
MARATHON INTERNATIONAL OIL COMPANY,
and
MARATHON PETROLEUM NORGE A/S,

Plaintiffs-Appellants/Cross-Appellees,

VERSUS

A.G. RUHRGAS,

Defendant-Appellee/Cross-Appellant.

Appeals from the United States District Court
for the Southern District of Texas

June 22, 1998

Before POLITZ, Chief Judge, KING, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHE, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, PARKER and DENNIS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Today we decide whether, on removal from a state court, a district court has discretion to resolve a challenge

to personal jurisdiction before ruling on a legally more difficult question concerning its alleged lack of subject-matter jurisdiction. We conclude that, at least in removed cases, district courts should decide issues of subject-matter jurisdiction first and, only if subject-matter jurisdiction is found to exist, reach issues of personal jurisdiction. Accordingly, we vacate the judgment and remand with instruction to rule on the motion to remand to state court for lack of subject-matter jurisdiction.

I.

Marathon Oil Company, Marathon International Oil Company, and Marathon Petroleum Norge A/S (collectively "Marathon") sued Ruhrgas, a German gas supplier, under various tort theories in Texas state court. The alleged torts arose from Ruhrgas's relationship with Marathon Petroleum Company Norway ("MPCN"), a Marathon affiliate that is the equitable owner of a portion of the Heimdal natural gas field in the North Atlantic. Marathon Petroleum Norge A/S ("Norge"), as a Norwegian company, is required by law to hold legal title to MPCN's interest in the field.

MPCN entered into a sale agreement with Ruhrgas and other gas buyers whereby, for a premium price, the buyers would purchase MPCN's gas from the Heimdal field. This agreement provides that any disputes between MPCN and the buyers will be resolved through arbitration in Sweden.

At some point after the agreement was signed, the price of gas fell, and the buyers, including Ruhrgas, refused to pay MPCN the premium contract price. MPCN

instituted arbitration proceedings in Sweden, whereupon MPCN's affiliates[1] instituted these tort suits against Ruhrgas in Texas state court. They allege that Ruhrgas conspired to monopolize the gas market, tortiously interfered with MPCN's business opportunities, and committed other, similar torts, which had the effect of harming them, as lenders to MPCN.

Ruhrgas removed the case to federal court, asserting diversity jurisdiction under 28 U.S.C. § 1332(a), federal arbitration jurisdiction under 9 U.S.C. § 205, and federal question jurisdiction under 28 U.S.C. § 1331 based on the federal common law of international relations. Ruhrgas moved to dismiss for lack of personal jurisdiction and, in the alternative, requested a stay of proceedings pending arbitration. Marathon moved to remand to state court, asserting a lack of federal subject-matter jurisdiction, and opposed compelled arbitration.

The district court determined that, under the caselaw of this circuit, it had discretion to address personal jurisdiction before reaching the legally more difficult subject-matter jurisdiction issue. Finding personal jurisdiction lacking, the court dismissed the action and otherwise denied Ruhrgas's motion to compel arbitration. Marathon appealed, arguing that, on a motion to remand, the district court should have considered subject-matter jurisdiction before deciding personal jurisdiction.[2]

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[1] Marathon Oil Company owns Marathon International Oil Company, which in turn owns Norge and MPCN. MPCN is not a party to this suit.

[2] Ruhrgas cross-appealed, contending that it should have been entitled to an order compelling the plaintiffs to arbitrate.

A panel of this court determined that the district court lacked subject-matter jurisdiction, and thus it vacated the dismissal for lack of personal jurisdiction and remanded with instruction to remand to state court. Although acknowledging that "in some instances we have permitted the dismissal of an action for lack of personal jurisdiction without considering the question of subject matter jurisdiction,"[3] the panel concluded that "[t]he appropriate course [for a federal court] is to examine for subject matter jurisdiction constantly and, if it is found lacking, to remand to state court if appropriate, or otherwise dismiss."[4]

After the Supreme Court denied certiorari, we granted en banc review.[5] We now take this opportunity, as an en banc court, to reconcile the conflicting circuit precedent cited by the panel and to explain a district court's obligation concerning which challenge it should decide first when confronted with a removed case in which the existence of subject-matter jurisdiction is questionable and personal jurisdiction is contested. We conclude that the court should proceed to consider the issue of subject-matter jurisdiction (even if that is the more legally difficult issue) before proceeding to address

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[3] *Marathon Oil Co. v. Ruhrgas, A.G.*, 115 F.3d 315, 318 (5th Cir.) (citing *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489 (5th Cir. 1993); *Asociacion Nacional de Pescadores v. Dow Quimica*, 988 F.2d 559 (5th Cir. 1993); *Walker v. Savell*, 335 F.2d 536 (5th Cir. 1964)), *cert. denied*, 118 S.Ct. 413 (1997).

[4] *Id.* (citing *Ziegler v. Champion Mortgage Co.*, 913 F.2d 228 (5th Cir. 1990)).

[5] *See Marathon Oil Co. v. Ruhrgas A.G.*, 129 F.3d 746 (1997) (granting rehearing en banc).

whether it (or, for that matter, the state court) would have personal jurisdiction over the protesting defendant.

II.

"[F]ederal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress." *Aldinger v. Howard*, 427 U.S. 1, 15 (1976). The Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. "This language reflects a deliberate compromise[, known as the Madisonian Compromise,] reached at the Constitutional Convention between those who thought that the establishment of lower federal courts should be constitutionally mandatory and those who thought there should be no federal courts at all except for a Supreme Court with, *inter alia*, appellate jurisdiction to review state court judgments." RICHARD H. FALLON, ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 348 (4th ed.1996).

The effect of the compromise is this: "Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other [federal] court . . . derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution." *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922). Accordingly, "we should proceed with caution in construing constitutional and statutory provisions dealing with the jurisdiction of the

federal courts," *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971), because the Constitution leaves Congress the policy choice concerning how far the federal courts' jurisdiction should extend.

Under our federal constitutional scheme, the state courts are assumed to be equally capable of deciding state and federal issues.[6] To the extent that Congress elects to confer only limited jurisdiction on the federal courts, state courts become the sole vehicle for obtaining initial review of some federal and state claims. *Cf., e.g., Victory Carriers*, 404 U.S. at 212. Where Congress has given the lower federal courts jurisdiction over certain controversies, " '[d]ue regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined.' " *Id.* (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)).

The importance of both the lower federal courts' constitutional and statutory subject-matter jurisdiction should not be underestimated. "Because of their unusual nature, and because *it would not simply be wrong but indeed would be an unconstitutional invasion of the powers reserved to the states if federal courts were to entertain cases not within their jurisdiction*, the rule is well settled that the party seeking to invoke the jurisdiction of a federal court must

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[6] *See Tafflin v. Levitt*, 493 U.S. 455, 458 (1990); *see also Robb v. Connolly*, 111 U.S. 624, 637 (1884) (Harlan, J.) ("Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States. . . . ").

demonstrate that the case is within the competence of that court." 13 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3522, at 61-62 (2d ed. 1984) (emphasis added).[7]

When a federal court acts outside its statutory subject-matter jurisdiction, it violates the fundamental constitutional precept of limited federal power. *See Oliver v. Trunkline Gas Co.*, 789 F.2d 341, 343 (5th Cir. 1986) (Higginbotham, J.). "Federal courts are courts of limited jurisdiction by origin and design, implementing a basic principle of our system of limited government. In sum, we do not visit a mere technicality upon the parties [by remanding to state court because their case falls outside the jurisdictional statutes]. Rather, we uphold a basic tenet of the American system of diffused political and judicial power." *Id.*

Since the panel issued its opinion, the Supreme Court has reminded us that our jurisdiction must be considered at the outset of a case. This Term, the Court rejected what the Ninth Circuit had labeled the " 'doctrine of hypothetical jurisdiction' " – the process of " 'assuming' [Article III] jurisdiction for the purpose of deciding the merits" of a case. *Steel Co. v. Citizens for a Better Env't*, 118 S.Ct. 1003, 1012 (1998) (majority opinion) (quoting *United States v. Troescher*, 99 F.3d 933, 934 n.1 (9th Cir. 1996)). The *Steel Co.* Court remarked:

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[7] *See, e.g., Mansfield, C. & L.M. Ry. v. Swan*, 111 U.S. 379, 382 (1884) (stating that "the rule [that a court not act outside its jurisdiction], *springing from the nature and limits of the judicial power of the United States*, is inflexible and without exception") (emphasis added).

This is essentially the position embraced by several Courts of Appeals, which find it proper to proceed immediately to the merits question, despite jurisdictional objections, at least where (1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied. . . .

We decline to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers. This conclusion should come as no surprise, since it is reflected in a long and venerable line of our cases. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 7 Wall. 506, 514, 19 L. Ed. 264 (1868). . . . The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception." Mansfield, *C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382, 4 S. Ct. 510, 28 L. Ed. 462 (1884).

. . .

> "[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,'. . . ." *Arizonans for Official English v. Arizona*, . . . 117 S.Ct. 1055, 1071 . . . (1997). . . .

Id., at 1012-13.

The rule that we first address our jurisdiction is so fundamental that "we are obliged to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278 (1977) (citations omitted). "The general rule is that the parties cannot confer on a federal court jurisdiction that has not been vested in that court by the Constitution and Congress. This means that the parties cannot waive lack of [subject-matter] jurisdiction by express consent, or by conduct, or even by estoppel; the subject matter jurisdiction of the federal courts is too basic a concern to the judicial system to be left to the whims and tactical concerns of the litigants." 13 WRIGHT ET AL., *supra*, § 3522, at 66-68 (citations omitted); *see, e.g., Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

III.

Ruhrgas does not dispute that a federal district court must determine its jurisdiction before proceeding to the merits of the case. It contests only the proposition that the federal court must reach the issue of *subject-matter* jurisdiction before reaching a challenge to *personal* jurisdiction. Ruhrgas argues that the district court may decide the personal jurisdiction challenge first, because "jurisdiction is jurisdiction is jurisdiction."

Because a federal district court must have both subject-matter jurisdiction over the removed controversy and personal jurisdiction over the defendant, so the argument goes, the court should have discretion to decide the easier

jurisdictional challenge first, to save judicial resources and to avoid tougher legal issues. We find Ruhrgas's advocacy of a discretionary rule in the removal context unpersuasive, as we explain.

A.

Although the personal jurisdiction requirement is a "fundamental principl[e] of jurisprudence," *Wilson v. Seligman*, 144 U.S. 41, 46 (1892), without which a court cannot adjudicate, the requirement of personal jurisdiction, unlike that of subject-matter jurisdiction, "may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue." *Insurance Corp. of Ireland*, 456 U.S. at 704; *see also* FED. R. CIV. P. 12(h). The defendant's ability to waive the defense arises from the reality that "[t]he requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. . . . It represents a restriction on the judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Insurance Corp. of Ireland*, 456 U.S. at 702; *see also Omni Capital Int'l v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104 (1987) (quoting the same).

The Supreme Court has carefully elucidated the distinctions between subject-matter and personal jurisdiction:

> Subject-matter jurisdiction, then, *is an Art. III as well as a statutory requirement*; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, principles of estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion. '[T]he rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record.' *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884).
>
> *None of this is true with respect to personal jurisdiction.*

Insurance Corp. of Ireland, 456 U.S. at 702 (emphasis added) (citations omitted). The Court therefore has indicated that "jurisdiction" is not always "jurisdiction." The distinction is that subject-matter jurisdictional requirements prevent our overreaching into the powers that the Constitution and Congress have left to the state courts, while personal jurisdiction requirements prevent both state and federal courts from upsetting the defendant's settled expectations as to where it can reasonably anticipate being sued. *See id.* at 702-04.[8]

[8] Following oral argument in the instant en banc proceeding, the Supreme Court once again has reminded us of the distinction between restrictions on subject-matter jurisdiction inherent in Article III and those that operate as an external limitation on an Article III court's adjudication. *See Calderon v. Ashmus*, 118 S. Ct. 1694, 1697 n.2 (1998).

The *Steel Co.* majority opinion plainly contemplates *Article III* jurisdiction in its use of the term "jurisdiction." *See Steel Co.*, 118 S. Ct. at 1013 ("Justice STEVENS' arguments . . . asserting that a court *may* decide the cause of action before resolving Article III jurisdiction – are readily refuted."). Although that case dealt with the easier issue of whether a federal court could pretermit questions about its subject-matter jurisdiction in order to reach a case's "merits," the teachings of Steel Co. – combined with the reasons we discuss in more detail below – counsel against a discretionary rule in the case before us.

B.

A federal court's dismissal for lack of personal jurisdiction affects the state court from which a case was removed in a way that a remand for lack of subject-matter jurisdiction does not. As Ruhrgas concedes, dismissal for a lack of personal jurisdiction adjudicates the matter between the parties and is binding on the state court.[9]

It follows that in the removal context, when a federal district court that lacks federal subject-matter jurisdiction dismisses instead for want of personal jurisdiction, it impermissibly wrests that decision from the state courts. This follows from the fact that because, after remand,

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[9] "It has long been the rule that principles of res judicata apply to jurisdictional determinations – both subject matter and personal. *See Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940); *Stoll v. Gottlieb*, 305 U.S. 165 (1938)." *Insurance Corp. of Ireland*, 456 U.S. at 702 n.9; *see also Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990) (citing the same).

such a case would have to remain within the state courts, *see, e.g., Healy*, 292 U.S. at 270, questions of personal jurisdiction necessarily would fall within the state courts' exclusive, residual jurisdiction. Those courts are entitled to their own, independent – and absent a controlling Supreme Court decision – even conflicting interpretation of their state's long-arm statute and of the minimum contacts requirements of the federal Due Process Clause.[10]

A federal court's decision that it lacks subject-matter jurisdiction, by contrast, returns the case to the state court so that it can adjudicate or dismiss. That decision does not intrude on "[t]he power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts. . . . " Healy, 292 U.S. at 270.

Contrary, therefore, to Ruhrgas's statement at oral argument that we are merely "reliev[ing] the state court of the burden of ruling on personal jurisdiction," the discretionary rule threatens the Article III principles of separation of powers and federalism in the context of a removed case. In sum, a federal court can remand a

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[10] *Cf., e.g., Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) ("Under [our] system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States."); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 342 (1816) ("It was foreseen, that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognisance of cases arising under the constitution, the laws and treaties of the United States.").

removed case for lack of subject-matter jurisdiction without offending the right and residual power of a state court to adjudicate, or dispose of, that case, but the federal court cannot do the same by assuming that it has subject-matter jurisdiction in order to reach an easier personal jurisdiction issue.[11]

C.

The usurpation of the state courts' residual jurisdiction to adjudicate the personal jurisdiction question is not the only reason for eschewing a discretionary rule in the removal context. A discretionary rule may also create incentives for defendants to subvert the orderly scheme for removing cases by acting opportunistically.

State-court defendants who face, at the margin of existing precedent, a more plaintiff-friendly due-process/minimum-contacts jurisprudence in state court could, under the discretionary rule, manufacture a convoluted

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[11] Implicit in Ruhrgas's advocacy of a discretionary rule in the removal context is the notion that a defendant's right of removal is of the same dignity as the plaintiff's choice of forum. "The defendant's right to remove and the plaintiff's right to choose the forum are not equal, [however,] and uncertainties are resolved in favor of remand." 16 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 107.05, at 107-24 through 107-25 & nn. 5, 6 (3d ed. 1997) (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 104-07 (1941)). This presumption in favor of remand underscores that in the removal context, where the plaintiff chose state court, that court's interest in adjudicating the issue of personal jurisdiction, absent federal subject-matter jurisdiction, must be given special consideration.

theory of federal subject-matter jurisdiction, remove to federal court, and then take advantage of a stricter interpretation of personal-jurisdiction requirements in federal court, to have the case dismissed rather than remanded. The effect may be not only to reward the defendant's manipulation but also to make *our* interpretation of the state long-arm statute, and of the federal minimum contacts analysis, the default for the state courts in this circuit, whereas in the usual course, these state courts would be entitled to have their own interpretation of state and federal law, which would be reviewable only by the state courts and ultimately by the Supreme Court.

D.

We also find the discretionary rule unpersuasive in this case because its justification – judicial efficiency – is less weighty than are other, constitutionally based concerns. A principled discretionary rule also may not be very efficient.

First, our desire for efficiency cannot override separation-of-powers concerns. The latter rationale is of constitutional import, while the former is not: "[S]eparation of powers was adopted in the Constitution 'not to promote efficiency but to preclude the exercise of arbitrary power.' Time has not lessened the concern of the Founders in devising a federal system which would likewise be a safeguard against arbitrary government." *Bartkus v. Illinois*, 359 U.S. 121, 137 (1959) (quoting *Myers v. United States*, 272 U.S. 52, 240, 293 (1926) (Brandeis, J., dissenting)). Indeed, this court has forcefully recognized this distinction: "We are fully aware of the inefficiency and

expense to which these [parties] are being subjected . . . [but w]e cannot avoid this result [of remanding to state court for lack of subject-matter jurisdiction], for the rules of federal jurisdiction, while sometimes technical and counterintuitive, are strict and mandatory." *Oliver*, 789 F.2d at 343 (Higginbotham, J.).

Second, even if we were to fashion a discretionary rule, there is no certainty that it would be more convenient to district courts than the formulation we adopt today. Because we would wish to draw a discretionary rule in harmony with the constitutional principles that we have outlined, any resulting rule often would cause district courts to spend more time and effort than previously, when considering whether personal jurisdiction should be decided before subject-matter jurisdiction. In any given case, it might be more efficient for a district court to address the tough legal issues of subject-matter jurisdiction rather than to engage in a difficult balancing inquiry regarding personal jurisdiction.

IV.

Therefore, as the panel stated, in a case such as this one, "[t]he appropriate course is to examine for subject matter jurisdiction constantly and, if it is found lacking, to remand to state court if appropriate, or otherwise dismiss." *Marathon*, 115 F.3d at 318 (citing *Ziegler v. Champion Mortgage Co.*, 913 F.2d 228 (5th Cir. 1990)). Such a methodology respects the limits that Congress has placed on the federal courts to adjudicate cases. It also accords the proper respect to the state courts, as the residual

courts of general jurisdiction, to make the personal jurisdiction inquiry when we lack either constitutional or statutory subject-matter jurisdiction over a removed case. *See Healy*, 292 U.S. at 270.

V.

A.

Our holding not only is supported by the aforementioned constitutional precepts, but also is grounded in our prior caselaw. Today we follow our holding in *Ziegler v. Champion Mortgage Co.*, 913 F.2d 228, 229-30 (5th Cir. 1990).

In *Ziegler*, a plaintiff sued in state court alleging a breach of contract. *See id.* at 229. The defendants removed, asserting diversity jurisdiction. *See id.* When the plaintiff moved to remand because diversity jurisdiction was lacking, defendant Champion Mortgage moved to dismiss for want of personal jurisdiction. *See id.* That motion to dismiss was granted; the motion to remand was never addressed, because the district court concluded that its dismissal rendered the remand motion moot. *See id.* Final judgment was entered for the other defendants on the merits, and the plaintiff appealed. We *sua sponte* found complete diversity lacking and vacated the judgment. *See id.*

In doing so, we reiterated that "[f]ederal courts are courts of limited jurisdiction; therefore, we have a constitutional obligation to satisfy ourselves that subject matter jurisdiction is proper before we engage in the merits of an

appeal." *Id.* Our action of vacating the dismissal of Champion Mortgage for lack of personal jurisdiction established that the district court should have resolved subject-matter jurisdiction before entertaining the attack on personal jurisdiction.

The *Ziegler* court was aware that this part of its ruling could be perceived to be in tension with *Walker v. Savell*, 335 F.2d 536, 538 (5th Cir. 1964), in which we had stated that "the federal court had a right to consider the motion to quash service and determine the jurisdictional question before remanding the case to the state court." *Id.* The *Ziegler* court, however, found *Walker* distinguishable, because *Walker* dealt only with a choice between deciding a personal jurisdiction challenge and a remand motion based on a defect in *removal* jurisdiction, not one based on a defect in *subject-matter* jurisdiction. *See Ziegler*, 913 F.2d at 230.

"It is beyond doubt that although the parties can waive defects in removal, they cannot waive the requirement of original subject matter jurisdiction – in other words, they cannot confer jurisdiction where Congress has not granted it." *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1546 (5th Cir. 1991). The defendant in Walker was unable to remove to federal court *not* because there was no federal subject-matter jurisdiction, but because 28 U.S.C. § 1441(b) prohibits removal by an in-state defendant in diversity cases.[12] Such a removal defect is waivable if

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[12] *See Walker*, 335 F.2d at 539 (observing that "this case was, under the terms of the removal statute, unquestionably in the district court even though later subject to a proper motion for remand").

not timely asserted by the plaintiff. *See* 28 U.S.C. § 1447(c); *In re Shell Oil Co.*, 932 F.2d 1518, 1522-23 (5th Cir. 1991).

Contrariwise, in this case, neither party contends that the plaintiffs challenged removal on the basis that the defendant had failed to meet the waivable requirements of the removal statutes. Rather, the plaintiffs argue that the district court would lack subject-matter jurisdiction had the plaintiffs originally brought this case in federal court. Such an objection is not subject to waiver, *see Baris*, 932 F.2d at 1546, and is, as explained above, a more fundamental concern of the district court than is a waivable defect.

When subject-matter jurisdiction is not in question, accordingly, we continue to believe that the district court should enjoy the freedom outlined in *Walker* to decide which waivable jurisdictional defect to address in the first instance. "Thus, resting as it does on the broader issue of subject matter jurisdiction, our decision today does not affect this Court's holding in *Walker v. Savell.*" *Ziegler*, 913 F.2d at 230.

B.

Ruhrgas also argues that our rejection of the discretionary rule would be inconsistent with the well-settled principle that federal courts have jurisdiction to conduct discovery, to issue sanctions, to hold a trial, and to assess costs, even though they may lack subject-matter jurisdiction. *See, e.g., Willy v. Coastal Corp.*, 503 U.S. 131, 135-36 (1992) (upholding FED. R. CIV. P. 11 sanctions even though

the district court eventually concluded that it lacked Article III jurisdiction). The flaw with this argument, however, is that the functions to which Ruhrgas points do not have the adverse consequences of making a case-dispositive decision for the state court.

Should a federal court without statutory subject-matter jurisdiction issue sanctions, assess costs, hold a trial, or conduct discovery, any subsequent remand and proceedings that follow in state court will remain unaffected by those federal court actions. Such is not the case when a federal court dismisses for want of personal jurisdiction. In the instant case, for example, the dismissal for lack of personal jurisdiction not only ends all federal court litigation, but also ends all litigation in the state court to which the case would otherwise be remanded.[13]

C.

1.

We granted en banc review in part to resolve the conflicting precedents of this court, for *Ziegler* conflicts with *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489, 1494 (5th Cir. 1993), and *Asociacion Nacional de Pescadores v. Dow Quimica*, 988 F.2d 559, 566-67 (5th Cir. 1993).[14]

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[13] Given existing caselaw, the federal court's determination that there was no personal jurisdiction would be preclusive on the state court from which the case was removed. *See supra* note 9 (citing cases).

[14] In accordance with our rule of orderliness, subsequent panels cannot overrule prior panels, absent en banc review or a change in law by Congress or the Supreme Court. *See, e.g., Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997).

In *Asociacion Nacional*, the district court denied plaintiffs' motion to remand for want of subject-matter jurisdiction and proceeded to dismiss for lack of personal jurisdiction. *See Asociacion Nacional*, 988 F.2d at 563. On appeal, a panel of this court decided that the court had erred in failing to remand, as there was no federal subject-matter jurisdiction. *See id.* at 563-66. Instead of vacating the dismissal for lack of personal jurisdiction and remanding with instructions to remand to state court, the panel affirmed. *See id.* at 566-67.

The panel began its analysis by noting the "conceptually troubling" proposition that we could "sustain[ ] an order by the district court in a case over which the court did not have subject matter jurisdiction." *Id.* at 566. Unaware, however, that *Ziegler* had already foreclosed an expansion of *Walker* for the very "conceptually troubling" reasons that the *Asociacion Nacional* panel had identified, the panel expanded *Walker's* holding and affirmed the dismissal for lack of personal jurisdiction. *Id.* at 566-67.

A month after *Asociacion Nacional*, still another panel overlooked *Ziegler's* decision not to extend *Walker*. In *Villar*, 990 F.2d at 1494, we opined that "[i]n *Walker*, we

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Accordingly, *Ziegler* remains good law, even in the face of *Villar* and *Asociacion Nacional*. Nonetheless, and especially in view of the fact that the *Asociacion Nacional* and *Villar* panels apparently were unaware of *Ziegler*, we use this en banc opportunity to eliminate any confusion.

The panel in *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1066 (5th Cir. 1992), also mentioned, in *dictum*, that *Walker* supports a discretionary rule. That observation was not essential to the holding. Accordingly, that case (shorn of its *dictum*) remains unaffected by our decision today.

clearly held that district courts have the power to rule on motions challenging personal jurisdiction before reaching motions to remand." *Id.*

For the reasons explained above, *Ziegler's* interpretation of *Walker* is the better one. Indeed, had the *Villar* and *Asociacion Nacional* panels made their decisions in the knowledge, and with the benefit, of *Ziegler's* analysis,[15] they too may have reached a different result.

2.

Ruhrgas argues that turning back the reach of *Walker* would conflict with the view of the Second Circuit, which has adopted a discretionary rule. *See Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152, 155 (2d Cir. 1996).[16] We find

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[15] Although *Ziegler* was decided three years prior to *Asociacion Nacional* and *Villar*, neither opinion mentions *Ziegler*.

[16] *See also Cantor Fitzgerald*, 88 F.3d at 155 ("In our opinion, the District Court properly exercised its discretion in first deciding the motion to dismiss for lack of personal jurisdiction over the defendants before considering the question of federal subject-matter jurisdiction."). The Seventh Circuit, as well, mentioned and assumed a *Villar*-type interpretation of *Walker*, but ultimately expressed no opinion on the matter. *See Allen v. Ferguson*, 791 F.2d 611, 616 (7th Cir. 1986) ("[E]ven assuming *arguendo* that the *Walker* rule is correct, we find that the district court erred in deciding Ferguson's motion to dismiss for want of personal jurisdiction before determining whether there was complete diversity."). That court also stated, in passing, that the district court could have discretion to decide an easier personal jurisdiction challenge before addressing questions about its subject-matter jurisdiction when the federal and state courts' standards for personal jurisdiction would render the same conclusion that no personal jurisdiction exists. *See id.* at 615.

Although this rule is appealing because it recognizes the comity interests inherent in any exercise of the district court's discretion, ultimately we find this conclusion "conceptually troubling." *Asociacion Nacional*, 988 F.2d at 566. Admittedly, when we have proper jurisdiction, we often apply state courts' interpretations of their own laws under a "no harm, no foul" type rule (That is, we assume the state court would not change its interpretation of its own law in the case before us). When we lack subject-matter jurisdiction, however, we should leave the state courts free to apply their own law, as well as federal law, as they have interpreted it in the past, or as they wish to reinterpret it in the present.

[17] *Compare Rhulen*, 896 F.2d at 675-76 ("[T]he order below will be affirmed but on the ground that the Court lacks subject

Ruhrgas's concerns unjustified; its reliance on *Cantor Fitzgerald* is misplaced, as we now explain.

First, *Cantor Fitzgerald* conflicts with an earlier Second Circuit opinion, *Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n*, 896 F.2d 674 (2d Cir. 1990), in which that court held that "[t]he court below mistakenly passed on the asserted absence of personal jurisdiction over the Guaranty Association defendants. Where, as here, the defendant moves for dismissal under Rule 12(b)(1), Fed.R.Civ.P., as well as on other grounds, 'the court should consider the Rule 12(b)(1) challenge first since if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined.' " *Id.* at 678 (quoting 5 CHARLES A. WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350 (1st ed. 1969)). In light of *Rhulen*, the Second Circuit appears to have internally inconsistent views on this issue.[17]

Second, the *Cantor Fitzgerald* court grounded its holding primarily on *Browning-Ferris Indus. v. Muszynski*, 899 F.2d 151, 159-60 (2d Cir. 1990).[18] *Muszynski* was one of the cases adopting the now-discredited "doctrine of hypothetical jurisdiction" – finding that a federal court could reach an easier merits question before addressing a harder subject-matter jurisdiction challenge. *See Steel Co.*, 118 S.Ct. 1012 (citing *Muszynski* for this proposition). Once a court has determined that it can pretermit its jurisdiction to reach the merits, the decision to pretermit subject-matter jurisdiction to reach personal jurisdiction is easily made. As the Second Circuit has recently recognized, however, *Muszynski* is no longer good law after *Steel Co. See Fidelity Partners, Inc. v. First Trust Co.*, 1998 U.S.App. LEXIS 8072, at *14-*15 (2d Cir. Apr. 27, 1998) (Nos. 97-9589L, 97-963CON).

In sum, not only are the cases that Ruhrgas cites to support its advocacy of a discretionary rule in a case such as ours "conceptually troubling," *Asociacion Nacional*, 988 F.2d at 566, but they are also aberrational. Accordingly,

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matter jurisdiction, which precludes consideration of the existence of personal jurisdiction."), *with Cantor Fitzgerald*, 88 F.3d at 155.

[18] The *Cantor Fitzgerald* court also relied on *Can v. United States*, 14 F.3d 160, 162 n.1 (2d Cir. 1994), and *Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582, 584 n. 2 (2d Cir. 1993). Neither of these cases, however, supports *Cantor Fitzgerald's* holding. *Can* discusses *which* subject-matter jurisdiction challenge a district court should address first. *See Can*, 14 F.3d at 162 n.1. *Bi* adopts no rule, but instead addresses subject-matter jurisdiction *before* considering personal jurisdiction. *See Bi*, 984 F.2d at 584 n.2.

we decline to follow their lead and instead adopt the reasoning of *Ziegler* and *Rhulen*.

VI.

We now address some of Ruhrgas's other arguments. Specifically, we discuss the fairness implications for the removing defendant; the applicability of the minimum-contacts analysis in determining whether subject-matter jurisdiction exists; and the argument that our rule may have the effect of unnecessarily entangling the federal courts in difficult issues of state law and the state courts in issues of federal law.

A.

We are mindful that the personal-jurisdiction requirement embodies a rule of fundamental fairness for defendants. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985). We therefore appreciate Ruhrgas's argument that it would be unfair to force the defendant, which we assume *arguendo* is not subject to personal jurisdiction in any court, to litigate, upon removal, subject-matter jurisdiction in federal court only to be forced to return to state court to litigate personal jurisdiction there (if federal subject-matter jurisdiction is found not to exist).

We find this argument ultimately unpersuasive, however. The defendant's action in seeking to invoke the jurisdiction of the federal courts, through removal, indicates its willingness – indeed, its preference – to litigate the issue of subject-matter jurisdiction, a question on

which it has the burden of proof.[19] Had the issue of personal jurisdiction been more easily resolved in its favor than was the question of subject-matter jurisdiction, the defendant had the option to save itself the time and expense of litigating federal subject-matter jurisdiction by litigating the easily-resolved personal jurisdiction challenge in the state courts before removal. In any case, the fundamental-fairness requirement of personal jurisdiction will still be examined – by either state or federal court – after the district court has made its inquiry into subject-matter jurisdiction.[20]

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[19] *See Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 365 (5th Cir. 1995) (citing *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921)).

[20] We recognize that there may be a few instances in which "the jurisdictional facts are too intertwined with the merits to permit the [remand motion] determination to be made independently . . . [thus forcing the court to] leave the jurisdictional determination to trial." 2 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 12.30[3], at 12-37 (3d ed. 1998). Although many of the same considerations we express today may apply to such cases, other concerns may arise as well. Because the instant case deals solely with the decision to exercise discretion to address personal jurisdiction first because the *legal* issues of subject-matter jurisdiction are more complex than the legal issues surrounding personal jurisdiction, we have no occasion to opine on what rule should apply when the facts needed to support subject-matter jurisdiction are so "intertwined with the merits" of the case that they must await trial.

We also do not mean to straightjacket the district courts by designating what proceedings they may conduct, or in what order those proceedings must be conducted, when there is a pending issue as to subject-matter jurisdiction. Accordingly, while the *Ruhlen* court and professors Wright and Miller opine

B.

Ruhrgas also argues that, in cases like the instant one, our determination of subject-matter jurisdiction depends on an analysis of personal jurisdiction. *See Villar*, 990 F.2d at 1494-95. Because we are going to have to conduct the minimum contacts inquiry in any event, Ruhrgas avers, we might as well do it at the outset.

Specifically, Ruhrgas contends that Norge is included as a plaintiff solely to defeat federal diversity jurisdiction. One of the ways in which Ruhrgas attempts to prove that Norge has been "fraudulently joined" is to show that Norge could assert no claims against it. *See Marathon*, 115 F.3d at 319. To show that Norge has no viable claim, Ruhrgas argues that Norge could not subject Ruhrgas to service of process – that is, personal jurisdiction – in Texas state court.

Assuming, *arguendo*, that *Villar* correctly found that the minimum contacts analysis is relevant to a fraudulent joinder analysis, it does not alter our obligation to decide questions of subject-matter jurisdiction at the outset. For instance, assume that the district court determines that because Norge cannot serve Ruhrgas, Norge has been

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that a court should consider a rule 12(b)(1) challenge first, *see supra*, we read this to mean that the court must *rule* on the subject-matter jurisdiction challenge first. In their discretion, however, the courts are free to allow various aspects of the proceedings to go forward, as efficiency and fairness may dictate. "The district court is free to decide the best way to deal with [matters covered by rule 12(b)], because neither the federal rules nor the statutes provide a prescribed course." 2 MOORE ET AL., *supra*, § 12.50, at 12-102 through 12-103.

fraudulently joined. It does not follow that we should allow the district court the discretion to address personal jurisdiction first. Rather, in such a case, given the principles we have outlined above, the district court should find federal diversity subject-matter jurisdiction to exist, and proceed to decide the personal jurisdiction challenge without fear of trampling on the state courts' residual domain.

C.

Ruhrgas maintains that the rule we adopt could entangle federal courts unnecessarily in difficult decisions of state law joinder, and state courts in the federal law of personal jurisdiction. Specifically, Ruhrgas first argues that it plans to raise fraudulent joinder to establish diversity jurisdiction; the court's analysis will require the resolution of complex areas of state law. Second, Ruhrgas claims that the question of personal jurisdiction does not interfere with the state courts' autonomy, as the Texas long-arm statute reaches as far as the Constitution permits;[21] the inquiry, thus, is one of constitutional, not state, law.

Although we appreciate Ruhrgas's first argument, our adoption of it would create incentives for defendants in Ruhrgas's position to act opportunistically in the removal context. Essentially, the defendant's argument is that because it plans to invoke a convoluted theory of

[21] *See Schlobohm v. Schapiro*, 784 S.W.2d 355, 357 (Tex. 1990) (interpreting the Texas long-arm statute to reach the federal constitutional limit).

subject-matter jurisdiction to support removal – one requiring difficult interpretations of state law – we should dispense with its need to prove that federal subject-matter jurisdiction exists and proceed to grant it a dismissal for lack of personal jurisdiction. We find that argument unappealing.

We dispense with Ruhrgas's second argument even more expeditiously. As we have already described, Article III envisions state courts as the default for all claims, based in both state and federal law. *See Healy*, 292 U.S. at 270; *supra* part II. Where Congress has not extended federal subject-matter jurisdiction, we should respect the Article III default of residual state court jurisdiction. *See, e.g.*, 13 WRIGHT, ET AL., *supra*, § 3522, at 61-62. Therefore, although the ultimate issue might prove to be one of federal law, we may not deprive state courts of their authority to pass on that question.[22]

VII.

A.

We end by noting that our ruling today applies only to removed cases and is otherwise limited as mentioned above. Cases brought originally in the federal courts may raise other issues that we do not face in the instant case,

[22] *Cf. Tafflin*, 493 U.S. at 467 ("[W]e note that, far from disabling or frustrating federal interests, '[p]ermitting state courts to entertain federal causes of action facilitates the enforcement of federal rights.' ") (quoting *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 n.4 (1981)).

so any opinion as to those issues would, as a consequence, be premature.

B.

We also understand that the district court's decision to address the personal jurisdiction question at the outset was reasonably made, given the state of our existing precedent. Because of the novelty of some of the subject-matter jurisdiction claims, and because our court has been understandably pre-occupied in reconciling the confused state of our precedent concerning a district court's obligations, we remand the issue of whether there exists federal subject-matter jurisdiction to the able district court for its determination in the first instance.[23]

The judgment is VACATED, and this cause is REMANDED with instruction to address the motion to remand to state court for lack of federal subject-matter jurisdiction, and for other proceedings, as appropriate, consistent with this opinion.[24]

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[23] Although the district court may consider the panel opinion persuasive on the question of subject-matter jurisdiction, that opinion has been vacated and thus is no longer binding precedent, *see* 5TH CIR. R. 41.3; *United States v. Manges*, 110 F.3d 1162, 1173 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1675 (1998), and we express no opinion on that issue.

[24] Ruhrgas's motion to strike the plaintiffs' response to the amici filings is DISMISSED as moot.

PATRICK E. HIGGINBOTHAM, Circuit Judge, with whom KING, JOLLY, DAVIS, JONES, DUHÉ and BARKSDALE, Circuit Judges, join, dissenting:

Until the decision of the panel in this case, affirmed today by the majority, no appellate court in the United States had held that federal district courts may never dismiss a case for lack of personal jurisdiction without first deciding their subject matter jurisdiction. We elaborate the principles behind the regimen that had been in place in our circuit, concluding that the majority's claim of federalism on the facts before us is impoverished, a cape for unauthorized appellate rule making.

I.

Marathon Oil Company (MOC) is an Ohio corporation with its principal place of business in Houston, Texas. In 1976, MOC's affiliate, Marathon International Oil (MIO), purchased two European concerns, Pan Ocean and its subsidiary Pan Norge, who collectively held a North Sea gas production license. Pan Ocean later became Marathon Petroleum Norway (MPN), while Pan Ocean Norge was later renamed Marathon Petroleum Norge (Norge). The gas production license gave the Marathon companies the rights to 24% of the Heimdal gas field in the North Sea.

According to the Marathon plaintiffs, starting in the 1970's, Ruhrgas, A.G.; Statoil; and various other European companies secretly conspired to monopolize the gas market in Western Europe. Ruhrgas is Germany's primary gas production firm, while Statoil, Norway's state-owned gas company, has held since 1975 a 40% interest in

the Heimdal field. The plaintiffs allege that the conspirators planned to control the Western European gas market by channeling a large portion of North Sea gas reserves through Ruhrgas's production facilities in Germany.

As part of this "plan," Ruhrgas entered into an agreement in 1984 with MPN concerning the Heimdal gas field. Pursuant to the Heimdal Agreement, MPN was to drill gas from the Heimdal field and transfer it to the Ruhrgas plant in Germany. In exchange, Ruhrgas promised to provide MPN with premium prices for its gas and guaranteed pipeline transportation tariffs. The Heimdal Agreement contained a clause binding its signatories to arbitration in Stockholm, Sweden, under Norwegian law. The plaintiffs claim that Ruhrgas never had any intention of honoring its commitments under the Agreement.

The Marathon plaintiffs in this case, MOC, MIO, and Norge, were not formal parties to the Agreement, and they purport not to be seeking its enforcement in this litigation. Rather, the Plaintiffs allege that Ruhrgas's representations regarding the Agreement duped them into investing in their subsidiary, MPN, $300 million for the development of the Heimdal field and the erection of an underseas pipeline to the Ruhrgas plant in Germany. According to the plaintiffs, this investment played right into Ruhrgas's hands; after having expended such enormous sums to construct a pipeline between the Heimdal field and the Ruhrgas plant, the Marathon companies had no choice but to sell the Heimdal gas to Ruhrgas on terms dictated by Ruhrgas. Norge additionally asserts that the value of its license to produce Norwegian gas, dependent upon the Ruhrgas-MPN contract, was also held hostage by Ruhrgas.

Allegedly, Ruhrgas later failed to honor the premium prices and tariffs that it had promised to MPN. Thereafter, MOC, MIO, and Norge sued Ruhrgas in Texas state court for fraud, misrepresentation, civil conspiracy, and tortious interference with business relationships. Ruhrgas removed the case to federal court, invoking both diversity and federal question jurisdiction, as well as the statutory provision for the removal of cases relating to arbitration agreements falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *see* 9 U.S.C. § 205. Once in federal court, Ruhrgas moved for a stay of proceedings pending the European arbitration of MPN's case, but the district court denied Ruhrgas's request. Ruhrgas then moved to dismiss the case for lack of personal jurisdiction and on grounds of *forum non conveniens*, while Marathon countered by moving to remand for lack of subject matter jurisdiction. The district court, relying on long-standing Fifth Circuit precedent, *see, e.g., Walker v. Savell*, 335 F.2d 536 (5th Cir. 1964), opted to decide first Ruhrgas's challenge to personal jurisdiction. The court granted Ruhrgas's motion to dismiss for lack of personal jurisdiction, rendering the plaintiffs' motion to remand moot. The court later denied Ruhrgas's motion to reconsider its previous decision not to stay all proceedings pending arbitration.

Both parties appealed. Despite the fact that the district court had dismissed the case for want of personal jurisdiction, a panel of our court held that it could not ignore the plaintiffs' challenge to subject matter jurisdiction. *See Marathon Oil Co. v. Ruhrgas, A.G.*, 115 F.3d 315, 317-19 (5th Cir. 1997). Concluding that subject matter jurisdiction was indeed lacking, the panel vacated the

judgment of the district court and ordered the case remanded to state court.

II.

A.

No rule of civil procedure denies a federal district court the discretion to dismiss a case for want of jurisdiction by footing its decision upon a lack of personal jurisdiction rather than subject matter jurisdiction. A range of discretion to choose the basis for a dismissal for want of jurisdiction has long been recognized, and no court, until the panel opinion, had said otherwise. *See, e.g., Wilson v. Belin*, 20 F.3d 644, 651 n.8 (5th Cir.), *cert. denied*, 513 U.S. 930 (1994); *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489, 1494 (5th Cir. 1993), *cert. denied*, 510 U.S. 1044 (1994); *Asociacion Nacional de Pescadores v. Dow Quimica*, 988 F.2d 559, 566-67 (5th Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994); *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1066 (5th Cir.), *cert. denied*, 506 U.S. 867 (1992); *Walker*, 335 F.2d 536.[1] The practice has been so

[1] The majority opinion misreads the facts of *Walker*. The majority contends that *Walker* dealt only with the technical scope of the removal statute, for "[t]he defendant in *Walker* was unable to remove to federal court *not* because there was no federal subject-matter jurisdiction, but because 28 U.S.C. § 1441(b) prohibits removal by an in-state defendant in diversity cases." Majority op. at 18. Yet there were two defendants in *Walker*. The in-state defendant removed by invoking federal question jurisdiction, and the out-of-state defendant did so by citing diversity jurisdiction. *See Walker*, 335 F.2d at 538 ("Asserting that a separable controversy was alleged against Savell, arising under the laws of the United States, and in view of the non-resident status of Associated Press, the suit was removed to United States District Court. . . . "). *Walker* makes no mention of the in-state defendant rule because that rule was irrelevant.

commonplace that only two other circuits have even had the occasion to address the issue, despite its regular appearance on the dockets of federal trial courts across the country. *See, e.g., Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152, 155 (2d Cir. 1996); *Allen v. Ferguson*, 791 F.2d 611, 615 (7th Cir. 1986).[2] Practices do not become legitimate by

[2] Both *Cantor* and *Allen* agreed that district courts have discretion to dismiss for lack of personal jurisdiction in lieu of remanding for a lack of subject matter jurisdiction. It is true, as the majority opinion notes, that *Cantor* cites to a case advocating the now-overruled "hypothetical jurisdiction" doctrine. *See Cantor*, 88 F.3d at 155 (citing *Browning-Ferris Indus. v. Muszynski*, 899 F.2d 151 (2d Cir. 1990)). Yet *Cantor* did not premise its holding on the notion of "hypothetical jurisdiction," and the sensible comments the *Cantor* court made about personal jurisdiction were untouched by *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1012 (1998). The majority's conclusion that *Cantor* conflicted with the earlier Second Circuit opinion in *Rhulen Agency, Inc., v. Alabama Ins. Guar. Ass'n*, 896 F.2d 674 (2d Cir. 1990), is in error. *Cantor* expressly distinguished *Rhulen* on the basis that the personal jurisdictional defect in *Rhulen* was not easier to resolve than the defect in subject matter jurisdiction. The majority opinion makes no mention of the fact that *Cantor* treated and distinguished *Rhulen*. Judge Newman was a member of both panels. Our view of Second Circuit law is controlled by what that circuit says it is.

Although the *Allen* court declined to embrace "the broader reading of *Walker*," *Allen*, 791 F.2d at 615, the *Allen* court at least assumed that in certain circumstances a district court could dismiss for want of personal jurisdiction rather than remand for a defect in subject matter jurisdiction. Otherwise, it need never have conducted an analysis of the relative complexities of the alleged jurisdictional defects before it. *See id.* at 616.

virtue of their long standing. Yet for the simple truth that we stand on the shoulders of those before us, if for no other reason, we must be hesitant when we act on recent flashes of "new" insight to the fundamentals of governance.[3]

The majority reverses course and holds that district courts possess no discretion to decide issues of personal jurisdiction before those of subject matter jurisdiction. This contention inexplicably relies upon an obvious and settled, but irrelevant proposition: federal courts are without the authority to decide the merits of a case when they lack subject matter jurisdiction. *See, e.g., B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 548 (Former 5th Cir. 1981). Relatedly, the argument continues, courts must raise the issue of subject matter jurisdiction sua sponte, *see, e.g., Trizec Properties, Inc. v. United States Mineral Prods. Co.*, 974 F.2d 602 (5th Cir. 1992); and parties may not waive defects in subject matter jurisdiction, *see, e.g., California v. LaRue*, 409 U.S. 109, 112 n.3 (1972). The argument points to a recent decision of the Supreme Court repudiating the practice of " 'assuming' [subject matter jurisdiction] for the purpose of deciding the merits." *Steel*

[3] The majority opinion relies heavily on *Ziegler v. Champion Mortgage Co.*, 913 F.2d 228 (5th Cir. 1990). Judge Gee in *Ziegler* was presented with a *merits judgment* rendered against two defendants, both of whom were from the same state as the plaintiff. The third defendant had long since been dismissed for a want of personal jurisdiction, a dismissal that was not before Judge Gee. The *Ziegler* panel thus did the obvious thing and vacated the judgment for a want of diversity jurisdiction. A suggestion that the situation facing Judge Gee is somehow analogous to the one before us is mistaken.

Co. v. Citizens for a Better Environment, 118 S.Ct. 1003, 1012 (1998). The *Steel Co.* Court stressed that "the requirement that jurisdiction be established as a threshold matter . . . is 'inflexible and without exception,' " *id.* (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)), and that " '[w]ithout jurisdiction the court cannot proceed at all in any cause,' " *id.* (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). The plain lack of relevance in this contention teases us to look for more, for surely more there must be.

Ultimately the majority derives from this case law an ordering of jurisdictional concepts headed by subject matter jurisdiction, with the correlative that federal courts must always resolve challenges to subject matter jurisdiction before challenges to personal jurisdiction. The contention that subject matter jurisdiction exists above personal jurisdiction in some hierarchy of jurisdictional importance is untenable. It sees personal jurisdiction in a subordinate role, nigh a merit determination. This contention misunderstands jurisdiction. Justice Holmes put it succinctly: "The foundation of jurisdiction is physical power." *McDonald v. Mabee*, 243 U.S. 90, 91 (1917). Personal and subject matter jurisdiction do not differ in relevant ways. As we will explain, a federal district court is powerless to decide the merits of a case if it lacks either subject matter or personal jurisdiction. Both jurisdictional requirements are rooted in constitutional commands of case or controversy and due process. And both are implemented by the Congress. As Justice O'Connor recognized in *Commodity Futures Trading Comm'n. v. Schor*, 478 U.S. 833 (1986), Article III protects both personal and structured interests.

It simply cannot be gainsaid that "[t]he validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter *and* the parties." *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 701 (1982) (emphasis added); *see also Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938). As the Supreme Court noted in 1937, personal jurisdiction is as integral to the power of a federal court as is subject matter jurisdiction:

> Counsel for the petitioner assume that the presence of the defendant was not an element of the court's jurisdiction as a federal court; but the assumption is a mistaken one. By repeated decisions in this Court it has been adjudged that the presence of the defendant in a suit *in personam*, such as the one now under discussion, is an essential element of the jurisdiction of a district (formerly circuit) court as a federal court, and that in the absence of this element *the court is powerless to proceed to an adjudication.*

Employers Reinsurance Corp. v. Bryant, 299 U.S. 374, 382 (1937) (footnote omitted and emphasis added). Indeed, the requirement that federal courts possess personal jurisdiction over the parties is not derived from extralegal judicial concerns about fairness or equity; rather, it is rooted in the Due Process Clause of the Constitution. *See Compagnie des Bauxites*, 456 U.S. at 702.

Subject matter jurisdiction is best understood as a structural right, for "it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign." *Id.* Personal jurisdiction, on the other hand, is an "individual liberty interest" which "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Id.* This

difference accounts for the fact that personal jurisdiction may be waived by the parties, whereas subject matter jurisdiction may not. *Compare Commodity Futures Trading Comm'n*, 478 U.S. at 850-51 (noting that structural rights may not be waived), *with Compagnie des Bauxites*, 456 U.S. at 703 (noting that individual rights may be waived).[4] From this principle follows naturally the rule that defects in subject matter jurisdiction must be raised by a court *sua sponte*, while deficiencies in personal jurisdiction need not. Where the parties do not challenge personal jurisdiction, their failure can be construed as a functional waiver, whereas parties cannot waive subject matter jurisdiction by their silence. The simple fact that personal jurisdiction is subject to waiver, however, does not somehow function to elevate subject matter jurisdiction in status. Both are critical to the power of a court; both are rooted in core constitutional precepts.

There is sequence to be sure. Questions of standing and subject matter jurisdiction are usually engaged at the outset of a case, and often that is the most efficient way of going. The majority's effort to support a mandated sequence, however, rests on a flawed vision of the relationship between Article III and the power of the inferior courts. It is true that Article III limits disputes that Congress can assign to the federal courts, both in terms of

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[4] Even this description of the difference between subject matter and personal jurisdiction is an overstatement. Personal jurisdiction can express territorial limits, akin to securing sovereign interests. The structured protections of subject matter jurisdiction are heavily influenced by consent. *See Pennoyer v. Neff*, 95 U.S. 714 (1877); *Commodity Futures Trading Comm'n*, 478 U.S. 833.

case or controversy and in terms of disputes finally resolvable by courts. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792). It is equally true that Article III grants to Congress the authority both to create inferior courts and to confer so much of the jurisdiction authorized by Article III that Congress chooses. The multi-purposed role of Article III with the hand of Congress at every turn belies the assertion that personal jurisdiction enjoys lesser regard than subject matter jurisdiction – Due Process as opposed to Article III. Thus, when federal courts examine our subject matter jurisdiction, we are ordinarily construing the jurisdiction-authorizing statutes present in Title 28 of the U.S. Code, not Article III or any power flowing directly from it. Indeed, one of the attacks upon jurisdiction pointed to here as a defect in subject matter jurisdiction – a lack of complete diversity – is not itself a requirement of Article III, but rather suffers from want of a jurisdictional grant by Congress. In the literal sense then, personal jurisdiction rests more immediately upon a constitutional command than does a want of complete diversity. Contrary to the majority's suggestion, there is no subordinate role for personal jurisdiction in these fundamentals of our federalism.

Although the majority heavily relies upon the inapposite *Steel Co.* decision, it is in fact the majority that cannot square its opinion with recent Supreme Court jurisprudence. In *Caterpillar, Inc. v. Lewis*, 117 S. Ct. 467 (1996), a unanimous Court employed long-standing precedent to hold that a district court's judgment may stand in a removed case even if the court lacked subject matter

jurisdiction at the time of removal, so long as the jurisdictional defect was cured by the time of judgment. In *Caterpillar*, upon removal there was a lack of complete diversity between the parties, but this defect was later cured by the district court's subsequent dismissal of a nondiverse defendant following a settlement between the parties. Indeed, the plaintiff in *Caterpillar* explicitly objected to jurisdiction shortly after removal, an objection that was erroneously overruled by the trial court. The majority opinion in this case travels against *Caterpillar*, for its absolutist approach to subject matter jurisdiction would suggest that every decision entered by the *Caterpillar* district court following the improper removal, from the dismissal of the nondiverse party to the entry of final judgment, was void. If the Supreme Court tolerates a capture of jurisdiction through the dismissal of a settling party by a court that lacked subject matter jurisdiction, surely it permits a district court to dismiss a case for want of personal jurisdiction, before considering a challenge to subject matter jurisdiction.

It is well settled that federal courts have jurisdiction to determine their own jurisdiction. *See, e.g., Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1078 (7th Cir. 1987). In the end, the majority concludes that this "jurisdiction to determine jurisdiction" does not encompass "jurisdiction to determine personal jurisdiction"; that a court without subject matter jurisdiction lacks the power to dismiss the case for lack of personal jurisdiction. As we have stated, there is no authority, either in the Constitution or the case law, to support this conclusion. Ironically, if the district court lacked the power to dismiss for want of personal jurisdiction because it lacked (had not

decided) subject matter jurisdiction, the dismissal would have no binding effect on the state court. Yet binding effect is the premise of the majority's invoking of federalism.

B.

Much is made here of the fact that this case was removed from state court. Indeed, the majority opinion attempts to limit itself to removal situations.[5] It is presumed that removal is an affront to states' interests and federalism. This argument fails to grasp the centrality of removal in our complex of state and federal courts. Removal jurisdiction is an integral part of our federalism, having been present since the Judiciary Act of 1789. Sec. 14, The Judiciary Act of 1789 (1 Stat. 73). Indeed, in the famous and early debate about the scope of federal jurisdiction in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), both sides proceeded from the assumption that removal was a fundamental, and noncontroversial, aspect of our federalist judicial system. *See id.* at 348-51 (Story, J.); *id.* at 378 (Johnson, J., concurring).

In 28 U.S.C. §§ 1331 & 1332, Congress allocated the concurrent jurisdiction of the federal and state courts. Congress has periodically expanded the scope of removal

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[5] Even assuming that there is, however, a hierarchy among jurisdictional issues grounded upon the structural limits ("Article III limits") of the federal courts' authority, as the majority opinion asserts, no principle justifies a distinction between cases removed to federal court and cases filed there originally. If the majority opinion's rule is true for removal, it is true for every form of federal jurisdiction.

jurisdiction where it was believed necessary to afford federal defendants or interests a federal forum or otherwise to promote uniformity in federal law. *See, e.g.*, 28 U.S.C. § 1443 (civil rights removal statute). Under this system, the statutory scheme is tilted toward adjudication of removable cases in federal court,[6] for state proceedings may not go forward unless both parties agree to forsake federal jurisdiction. Under 28 U.S.C. § 1441, defendants (unless they are local defendants) have the unilateral right to remove cases from the state courts. Similarly, if a plaintiff files a removable case in federal court, there is no corresponding statutory provision permitting the defendant to remand the case to state court. Accordingly, contrary to the position taken by the majority opinion, there is no substantive distinction between cases removed and those originally filed in federal court; both reflect a party's choice not to proceed in state court. Neither situation represents a constitutional misallocation of power to federal courts at the expense of state courts.

Absent bad-faith removal, a federal court's decision to address a defect in personal jurisdiction before one in subject matter jurisdiction therefore does not somehow frustrate the plaintiff's choice of forum, for Congress explicitly limits the presumptive status of concurrent jurisdiction by defining a defendant's right of removal. Its federal defenses aside, a defendant has a right equal to the plaintiff to invoke the jurisdiction of the federal court

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[6] Of course, we are to construe the removal statute narrowly. *See Willy v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir. 1988). Yet when removal applies, it places the state/federal forum decision in the defendant's hands.

for decision of the plaintiff's claims. Thus, so long as federal subject matter jurisdiction is nonfrivolously invoked, federalism offers no reason to distinguish between first engaging personal or subject matter jurisdiction. The removal statute itself contemplates removal before any state court adjudication of personal jurisdiction. *Cf.* 28 U.S.C. § 1448 (permitting first service of process after removal); 14A Wright & Miller, § 3721, at 228-29 ("A defendant . . . may move to dismiss for lack of personal jurisdiction after removal.") (notice of removal must be filed within thirty days of receipt of initial pleading). Courts frustrate no federalism principles when they address the constitutional issues of personal jurisdiction before addressing subject matter jurisdiction in a removed case.

C.

Of course, even though subject matter and personal jurisdiction are of equal importance to a federal court, challenges to one must inevitably be decided before challenges to the other. That said, the choice of a district court, its exercise of discretion, should be guided by familiar considerations. Here concerns such as efficiency and avoiding abuse of rights of removal become relevant – and indeed on the proper facts, so does federalism.

State and federal courts are equally competent to decide issues of personal jurisdiction, where those issues turn on federal constitutional law. *See Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976). In a diversity case, when a federal district court grants a motion to dismiss for want of personal jurisdiction over a non-resident of the forum

state, the ruling precludes the state court from deciding again the personal jurisdictional issue. *See Baldwin v. Iowa State Traveling Men's Assoc.*, 283 U.S. 522, 524-27 (1931) (concluding that federal court determinations as to personal jurisdiction are *res judicata* in subsequent litigation in state court). Simultaneously, it leaves subject matter jurisdiction for a second federal forum that has personal jurisdiction over the parties. Yet although this reality of the rules of preclusion is important, it is not determinative of whether a district court may move directly to the issue of personal jurisdiction.

In our view a district court should ordinarily first satisfy itself of its subject matter jurisdiction. Nonetheless, we would continue to hold that there are limited circumstances under which it may be more appropriate for the federal court to decide the issue of personal jurisdiction first. The case before us today is a good example.

When a challenge to personal jurisdiction is relatively straightforward and does not involve complex state-law questions, but the alleged defect in subject matter jurisdiction raises difficult issues of law, a district court's concerns for federalism may give way to its self-restraint. In general, district courts must avoid ruling on difficult, complex, or novel matters, if an easier and equally appropriate ground for decision is available to them. *See Allen*, 791 F.2d at 615 ("Of course, in keeping with the notions of judicial restraint, federal courts should not reach out to resolve complex and controversial questions when a decision may be based on a narrower ground."). At the same time, resolving a simple

matter of personal jurisdiction, premised on federal constitutional law, intrudes little upon the domain of state courts. If a federal court should determine that an issue of personal jurisdiction is resolved easily in favor of a defendant, little is accomplished, and much is wasted, by a remand to state court to permit that tribunal to come to the same conclusion.

True, such a course of action "precludes" the state court from deciding the issue of personal jurisdiction. Yet it is inevitable in our dualistic but hierarchical system of federal and state courts that the state courts will occasionally, for efficiency's sake, be deprived of the opportunity to pass on certain matters otherwise available to them; indeed, the very concept of supplemental jurisdiction is premised on this notion. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) ("[Supplemental jurisdiction's] justification lies in considerations of judicial economy, convenience, and fairness to litigants. . . . ").[7] Where, as here, the issue precluded from decision is a relatively simple question of federal law, blind invocations of "federalism" should give way to more sensible uses of judicial discretion. Of course, efficiency concerns cannot offer a justification for a federal court to reach the *merits* of a dispute in the absence of federal jurisdiction, personal or subject matter. There must be jurisdiction to decide the merits. That is what jurisdiction is. *See Oliver v.*

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[7] The contours of the discretion that we would reaffirm mirror closely the contours of district courts' discretion to exercise their supplemental jurisdiction. *See* 28 U.S.C. § 1367(c) (directing district courts to avoid supplemental claims that predominate over federal claims or raise novel or complex issues of state law).

Trunkline Gas Co., 789 F.2d 341, 343 (5th Cir. 1986) (a position reaffirmed by the Supreme Court a decade later). But given that there exists no "jurisdictional hierarchy," efficiency concerns can instruct the decision to dismiss for a defect in one jurisdictional basis as opposed to another.

Apart from the comparative simplicity of the challenges to a case's jurisdictional bases, other factors should inform a district court's decision to determine the order in which jurisdictional defects are addressed. The majority suggests that defendants might manufacture claims to subject matter jurisdiction in order to obtain a federal forum to hear their attacks on personal jurisdiction. Yet as the cases dismissed by the majority have recognized, district courts should opt to address challenges to personal jurisdiction only when removal is not frivolous and is made in apparent good faith. *See Pescadores*, 988 F.2d at 566-67. On the other hand, oftentimes the question of subject matter jurisdiction turns in part upon the presence of personal jurisdiction. In such situations, it is even more appropriate to resolve the objections to personal jurisdiction first. *See Villar*, 990 F.2d at 1494-95.

D.

We would reaffirm today that district courts possess discretion to address challenges to personal jurisdiction before it addresses subject matter jurisdiction. Courts typically should first confirm their subject matter jurisdiction. However, we believe that they may opt instead to resolve defects in personal jurisdiction when the attack

on personal jurisdiction presents a question of federal law that is far more easily resolved than a challenge to subject matter jurisdiction, when the defendant's removal is not frivolous and is made in apparent good faith, and when the challenge to personal jurisdiction does not raise significant issues of state law or the attack on subject matter jurisdiction does. Furthermore, in those situations in which the question of subject matter jurisdiction turns in part upon the presence of personal jurisdiction, it would again be appropriate to resolve the objections to personal jurisdiction first.

Recognizing that district courts possess a level of discretion is enormously preferable to the majority's alternative, a mechanical and rigid ordering of decision-making. We cannot see around corners, nor can we predict the infinite variety of cases that may one day come before our district courts. Rules that lack flexibility are often vices in and of themselves when dealing with trial courts. Given that we are not constitutionally compelled to craft a rigid standard for determining the order in which jurisdictional defects are addressed, we should eschew the invitation to invent one through appellate rulemaking. The very nature of the work of a federal trial judge here makes discretion a value in itself. Relatedly, we must not forget that sequencing, when required, has been by rulemaking, a cooperative enterprise of Congress and of the courts. Indeed, the courts acting alone crafted a set of rules for the exercise of pendent jurisdiction, only to conclude that the enterprise was the task for Congress. *See Finley v. United States*, 490 U.S. 545 (1989).

III.

Thus, we would hold that district courts possess discretion to consider motions challenging personal jurisdiction before those challenging subject matter jurisdiction. The sensible way in which this discretion had operated in our circuit until the panel opinion below is illustrated by the district court's handling of this case.

On the one hand, the plaintiffs' attack on subject matter jurisdiction before the district court raised an issue of first impression in this circuit. Although they challenged subject matter jurisdiction on multiple grounds, the plaintiffs' most troubling arguments were leveled against 9 U.S.C. § 205, which permits removal in cases "relating to" international arbitral agreements. According to the plaintiffs, their case in no way "related to" such an agreement because they were not seeking to enforce the underlying Heimdal Agreement between MPN and Ruhrgas. Ruhrgas, on the other hand, contended that the phrase "related to" pulls more cases into a federal court's removal jurisdiction than just those seeking to enforce the arbitral agreement itself. Disregarding Ruhrgas's other bases for removal, Ruhrgas's invocation of § 205 was certainly not frivolous. Furthermore, considering the mountain of amicus filings before our court criticizing the panel's interpretation of § 205, the plaintiffs' opposition to federal subject matter jurisdiction was a difficult one to address, implicating novel questions of law in this circuit. Finally, the presence of subject matter jurisdiction, at least as it related to diversity, turned in part on the question of the fraudulent joinder of Norge, a foreign corporation, as a plaintiff suing Ruhrgas, another foreign corporation. *See Corporacion Venezolana de Fomento*

v. Vintero Sales Corp., 629 F.2d 786, 790 (2d Cir. 1980) (noting that the presence of aliens on both sides of the case defeats diversity jurisdiction), *cert. denied*, 449 U.S. 1080 (1981). This issue overlapped with the question of personal jurisdiction.[8] In the end, the issues of subject matter jurisdiction are so complex that the majority opinion declines to address them, despite the full treatment given to them by the panel below. *See Marathon Oil*, 115 F.3d at 318 (describing the subject matter jurisdiction issue as "formidable").[9]

On the other hand, Ruhrgas's challenge to the court's personal jurisdiction was relatively straightforward. Ruhrgas contended that it lacked the requisite minimum contacts with Texas to support jurisdiction from a Texas court. Ruhrgas's motion required the district court only to consider the reach of the Texas long-arm statute, Tex. Civ. Prac. & Rem. Code § 17.042, which is governed by the federal Constitution's Due Process Clause. *See Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 200 (Tex. 1985). No substantial questions of purely state law were presented. Accordingly, the federal district court was at least as competent as any state court to decide the personal jurisdictional issue. In addition, as demonstrated

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[8] Norge would have to establish personal jurisdiction over Ruhrgas based on Ruhrgas's contacts with Texas that were pertinent to damaging the value of Norge's licence [sic] to produce Norwegian oil.

[9] Norge also asserted subject matter jurisdiction based on a federal law of international relations, insofar as Marathon's complaint implicated the actions of sovereign-owned Statoil, the Norwegian gas company.

below, the merits of Ruhrgas's challenge to personal jurisdiction could be resolved relatively easily in its favor.

Thus, the district court, in taking up personal jurisdiction, did not abuse what heretofore had been its discretion. Indeed, the majority does not suggest that it did. Although it parted from standard practice in not first resolving the attack on subject matter jurisdiction, the factors we have outlined above all supported the court's exercise of its discretion.

IV.

In the end, the majority's opinion is nothing more than an exercise in unauthorized judicial rulemaking. In the pursuit of a vindication of its view of federalism principles, the majority withdraws discretion from district courts and replaces it with a rigid sequencing of decisions, despite the absence of any constitutional, statutory, or jurisprudential compulsion to do so. In doing so, the majority ignores the Congress and pays little attention to the host of legal doctrines, from the Due-Process basis of personal jurisdiction to the *Caterpillar* rule to the concept of supplemental jurisdiction, that contradict its new rule of procedure. The Federal Rules of Civil Procedure address the issue of the order in which the defenses of lack of subject matter and lack of personal jurisdiction will be raised. Rules 12(b)(1) and (2) include both as preliminary defenses. The Rules of Civil Procedure regulate in various ways the order of conducting proceedings, including various pre-trial disputes over discovery, summary judgment, and trial itself. The majority does nothing more than pronounce an addendum to

Rule 12(b). This undertaking will rightfully be criticized as an imperial view of judicial roles and a confusion of life tenure with insight. We respectfully dissent.